CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 121.

THE NORTHERN LUMBER COMPANY, APPELLANT,

vs.

WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS, AND MARY E. COFFIN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED SEPTEMBER 29, 1905.

(19,915.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 4, 1906.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, begun and held at the United States Court House in the City of St. Paul, Minnesota, on the first Monday in May, to-wit: the first day of May, A. D. 1905, before the Honorable Willis Van Devanter, Circuit Judge, and the Honorable John E. Carland and the Honorable John C. Pollock, District Judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the fourth day of March, A. D. 1905, a transcript of record, pursuant to an appeal allowed by the Circuit Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The Northern Lumber Company was Appellant, and William O'Brien, *et al.*, were Appellees, which said transcript of record is in the words and figures following, to-wit:

1 United States Circuit Court, District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
No. 403. vs. Equity.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

Appearances: James B. Kerr and M. T. Sanders, St. Paul, Minnesota, Solicitors for Complainant.
J. N. Searles, Stillwater, Minnesota, Solicitor for Defendants.

Pleas in the United States [Circuit] Court, District of Minnesota, and Fifth Division thereof, in the above entitled cause.

Be It Remembered, That on the 3rd day of February, A. D. 1905, there was filed with the Clerk of said Court, at his office at Duluth, in the said District and Division. A Praecipe for the Record on Appeal in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, for the Eighth Circuit.

Northern Lumber Company, a corporation, Appellant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Appellees.

To Thos. H. Pressnell, Deputy Clerk of the Circuit Court of the United States for the District of Minnesota, Fifth Division:

2 An appeal having been taken and allowed from the decree of the Circuit Court of the United States for the District of Minnesota, Fifth Division, in the above entitled cause, please prepare and transmit as your return therein, and as the record in said cause, the following papers:

1st. Original bill of complaint.
2nd. Praecipe for subpoena for defendant Mary E. Coffin.
3rd. Subpoena and return of service on defendant Mary E. Coffin.
4th. Appearance of defendants William O'Brien, Albert J. Lammers and George A. Lammers.
5th. Answer of defendants Wm. O'Brien, Geo. A. Lammers and Albert J. Lammers.
6th. Replication.
7th. Stipulation of facts.

8th. Decision directing the restraining and enjoining defendants from removing timber, etc.

9th. Petition of complainant for leave to file supplemental bill.

10th. Stipulation that supplemental bill be filed (omitting bill attached.)

11th. Order granting leave to file supplemental bill.

12th. Supplemental bill.

13th. Answer of defendants Wm. O'Brien, Albert J. Lammers and Geo. A. Lammers to supplemental bill.

14th. Replication of complainant to answer of defendants O'Brien et al to supplemental bill.

15th. Order fixing time to take testimony.

16th. Stipulation that cause be set down for final hearing.

17th. Order setting cause down for final hearing.

18th. Opinion directing entry of decree dismissing bill and supplemental bill.

3 19th. Final decree.

20th. Petition for appeal and allowance thereof

21st. Assignment of errors.

22nd. Bond on appeal.

23rd. Citation and proof of service.

Yours, etc.,

JAMES B. KERR,
Solicitor for Appellant.

Indorsed: Praecipe for Record on Appeal. Filed Feb. 3, 1905, Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy.

That theretofore, to-wit: On the 30th day of December, A. D. 1902, there was filed with said Clerk the Bill of Complaint in said Cause, in the words and figures following, to-wit:

United States Circuit Court for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lamaners, George A. Lammers, and Mary E. Coffin, Defendant.

Bill of Complaint.

To the Honorable the Judges of the United States Circuit Court for the District of Minnesota, in Equity sitting:

Your orator, Northern Lumber Company, a corporation organized and existing under the laws of the State of Wisconsin bring this, its bill of complaint, against William O'Brien, Albert J. Lammers, George A. Lammers, and Mary E.
4 Coffin, and respectfully shows unto your Honors:

I.

That the Northern Pacific Railroad Company is a corporation created, organized and existing under and by virtue of an act of congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," and those certain acts and joint resolutions of congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act of congress said company was authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as should be determined by said company within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget sound, with a branch via the valley of the Columbia river to a point at or near Portland in the State of Oregon.

II.

That by the third section of said act of July 2, 1864, there was granted to said railroad company

"every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office."

That said railroad company duly accepted the terms,
5 conditions and impositions of said act of congress, and thereafter proceeded with the work of surveying, definitely locating and constructing its said railroad and telegraph line.

III.

And your orator further shows that on the 6th day of July, 1882, the said Northern Pacific Railroad Company duly filed in the office of the commissioner of the general land office, a certain map or plat, duly approved by the secretary of the interior,

showing the line of definite location of that portion of its road extending from Thomson Junction, in the State of Minnesota, eastwardly to Ashland, in the State of Wisconsin.

IV.

And your orator shows that thereafter the said Northern Pacific Railroad Company duly definitely located the whole of its line of railroad extending from a point on Lake Superior, in the State of Wisconsin, westwardly to a point on Puget sound, and thereafter duly constructed and completed its said railroad and telegraph line upon said line of definite location, in all respects as required by the provisions of said act of July 2, 1864.

V.

And your orator further shows that the south half of the south-east quarter (S ½ S E ¼) of section twenty-seven (27), township fifty-two (52) north of range fifteen (15) west of the fourth principal meridian is coterminous with and within twenty miles of that portion of said road from Thomson Junction to Ashland so definitely located as aforesaid. That at the date of the grant to said Northern Pacific Railroad Company, and at the time the line of said railroad coterminous with said land was definitely fixed, as aforesaid, said land was public land of the United States, not reserved, sold, granted, or otherwise
6 appropriated, and was free from pre-emption or other claims or rights, and was non-mineral in character.

VI.

And your orator further shows that by reason of the facts hereinbefore set forth said Northern Pacific Railroad Company became the owner, in fee simple, of the said south half of the southeast quarter (S½ S E¼) of section twenty-seven (27), township fifty-two (52) north, range fifteen (15) west of the fourth principal meridian, Minnesota; and that thereafter, and on October 17, 1883, said company filed in the United States district land office at Duluth, Minnesota, its certain list known as Duluth List No. 9, wherein, among other lands, was listed the land above described, such listing being done for the purpose of bringing said lands formally before the officers of the interior department for examination and patenting to said company.

VII.

And your orator further shows that in the year 1893 the Northern Pacific Railroad Company was insolvent and unable to pay the interest on certain bonds secured by mortgages on its

lands and other property; and thereafter in a certain cause in equity commenced by the creditors of said railroad company for the foreclosure of said mortgages and for the sequestration and distribution of the property of said company for the benefit of the secured and unsecured creditors of said railroad company receivers were appointed by the United States Circuit Court for the district of Minnesota of all the property of said railroad company, including the land hereinbefore described; that said circuit court so appointing said receivers duly authorized and directed them to sell the lands of the Northern Pacific Railroad Company situate in the State of Minnesota, and to make
7 contracts and deeds therefor. And your orator shows that thereafter, to-wit: on the 4th day of November, 1898, Edwin H. McHenry and Frank G. Bigelow, the receivers so appointed and empowered by said Court as aforesaid, sold and conveyed by deed to Frederick Weyerhaeuser and John A. Humbird, the land hereinbefore described; and thereafter said Weyerhaeuser and Humbird, by their deed dated March 4, 1899, conveyed to the complainant, Northern Lumber Company, all the timber standing and growing on the land above described:

And your orator shows that the Northern Lumber Company is a corporation organized and existing under the laws of the State of Wisconsin.

VIII.

And your orator further shows that by an act of congress approved May 5, 1864, there was granted by the United States to the state of Minnesota, for the purpose of aiding in the construction of a railroad in said state from the City of St. Paul to the head of Lake Superior every alternate section of public land of the United States, not mineral, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, within the State of Minnesota; and it was provided in said act that in case it should appear that the United States had, when the line of the road to be constructed under said act was definitely fixed, disposed of any of the lands in said alternate sections, other lands equal in amount to the lands so disposed of should be selected for said company within twenty miles from the line of said road. And for a complete statement of all the terms and provisions of said act of congress, reference is hereby made to said act as the same appears in Volume 13 of the United States Statutes at large, at page 64. That thereafter the grant of lands so made by said act of congress became vested in the Lake Superior and Mississippi Railroad Company, which said company, on May 7,
8 1864, filed in the office of the commissioner of the general land office a map or diagram showing the general route of its said railroad from St. Paul to a point on Lake Superior.

That thereafter, and on May 26, 1864, the commissioner of the general land office transmitted a copy of said map or diagram to the register and receiver of the United States district land office at Duluth, Minnesota, with a letter as follows:

"General Land Office, May 26, 1864.

Register and Receiver,
Duluth, Minnesota.

Gentlemen: By the act approved May 5, 1864, a grant of lands was made to the State of Minnesota, to aid in the construction of a railroad from St. Paul to Lake Superior. The Secretary of the Interior having approved of a withdrawal of lands for said road, you will suspend from pre-emption, settlement and sale, a body of lands about twenty miles in width, as indicated on the inclosed diagram "A", marked 'Lake Superior and Mississippi Railroad.' Acknowledge the date of receipt of this.

Very respectfully, your ob't servant,
J. M. EDMONDS,
Commissioner."

And your orator further shows that said map or diagram so transmitted by the commissioner of the general land office to said register and receiver, as aforesaid, was so vague, uncertain, indefinite and inaccurate that it is impossible for your orator to ascertain or determine whether or not the land hereinbefore described fell within the place or indemnity limits, as shown on said map or diagram; and that the language of the attempted order of withdrawal as contained in said letter of May 26, 1864, is so vague, uncertain and indefinite that your orator can not determine whether or not it was thereby intended to include within such attempted withdrawal the land hereinbefore described.

And your orator shows that said attempted withdrawal of lands by said commissioner of the general land office was wrongful and without authority of law.

9 IX.

And your orator further shows that thereafter, to-wit: on the 25th day of September, 1866, the said Lake Superior and Mississippi Railroad Company filed in the office of the commissioner of the general land office a map showing the definite location of its railroad from St. Paul to Duluth, on Lake Superior. That thereupon the commissioner of the general land office marked and designated upon the plats in his office the ten mile, or place, limits of said grant; the ten-twenty or indemnity, limits of said grant; and also the terminal limits, beyond which said land grant did not extend. And your

orator further shows that the said south half of southeast quarter (S ½ S E¼) of section twenty-seven (27), township fifty-two (52) north, of range fifteen (15) west, Minnesota, is beyond or outside the northeastern terminus of said land grant, and is not within the place, indemnity, or any other limits of said grant.

X.

And your orator further shows that thereafter, in the month of April, 1901, the said list known as Duluth list No. 9 filed by said Northern Pacific Railroad Company in the [Unites] States district land office at Duluth, Minnesota, on October 17, 1883, as hereinbefore set forth, came before the commissioner of the general land office for examination and approval for patenting the lands to said company, but said commissioner, acting under a mistake of law, by his decision of April 6, 1901, refused to approve said list, and rejected the same, for the reason, as stated by him, that the lands therein described were reserved for the said Lake Superior and Mississippi Railroad Company at the date of the grant to said Northern Pacific Railroad Company, and were therefore excepted from the grant to said last named company. That from said decision by the commissioner of the general land office the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, appealed to the secretary of the interior, and the secretary of the interior, with all the facts before him, acting under a mistake of law, refused to approve said list, but rejected the same, and rendered a decision, under date of July 16, 1901, in the words and figures following, to-wit:

"The Northern Pacific Railway Company, successor in interest of the Northern Pacific Railroad Company, has appealed from your office decision of April 6, last, wherein it was held that certain described lands in the Duluth land District, Minnesota, and within the primary limits of the grant made by the act of July 2, 1864, (13 Stat., 365), in aid of the construction of the Northern Pacific railroad, were excepted from the operation of said grant because they were, at the date of the passage of said act, within ten miles of the probable route of the Lake Superior and Mississippi railroad, in aid of the construction of which a grant was made by the act of May 5, 1864 (13 Stat., 64), and were embraced within the withdrawal of May 26, 1864, made on account of the said last mentioned grant.

Upon the adjustment of the limits of the grant made by the act of May 5, 1864, supra, to the line of definite location of the Lake Superior and Mississippi railroad, effected September

25, 1866, by the filing and approval of the required map, the lands here in question were found to fall without said limits and were thereupon freed from said grant. The Northern Pacific Railroad was not definitely located opposite these lands until July 6, 1882, at which date they were free from adverse claim so far as shown by the record now before this Department.

The appeal filed on behalf of the railway company is based upon the ground that the withdrawal of May 26, 1864, being a withdrawal upon a map of probable or general route, did not prevent congress from granting the lands so withdrawn in aid of the construction of the Northern Pacific railroad, and that they were included in the grant to that company made by the act of July 2, 1864, because falling without the limits of the grant made by the act of May 5, 1864, as established by the definite location of the Lake Superior and Mississippi railroad, no right ever attached to them under the earlier grant. The decision of the Court in the case of United States v. Oregon and California R. R. Co. (176 U. S., 28), is relied upon to sustain this claim.

In the case of Bardon v. Northern Pacific Railroad Co. (145 U. S., 535), one Robinson had settled upon a portion of an odd numbered section within the limits of the grant made by the act of July 2, 1864, for which he filed a pre-emption declaratory statement of September 21, 1853. He died without
11 making proof and payment under said filing, and on July 30, 1857, his heirs made payment for the land and certificate of purchase issued thereon. On August 5, 1863, said certificate and pre-emption filing were cancelled. In holding that said land was excepted from the operation of the grant here in question, it was said by the Court:

It is thus seen that when the grant to the Northern Pacific Railroad Company was made, on the 2nd day of July, 1864, the premises in controversy had been taken up on the pre-emption claim of Robinson, and that the pre-emption entry made was uncanceled; that by such pre-emption entry the land was not at the time a part of the public lands; and that no interest therein passed to that company. The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All lands, to which any claims or rights of others have attached, do not fall within the designation of public land. The statute also says that whenever, prior to the definite location of the route of the road, and of course prior to the grant made, any of the lands which would otherwise fall within it have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise dis-

posed of, other lands are to be selected in lieu thereof under the direction of the Secretary of the Interior. There would therefore be no question that the pre-emption entry by the heirs of Robinson, the payment of the sums due to the government having been made, as the law allowed, by them after his death, took the land from the operation of the subsequent grant to the Northern Pacific Railroad Company, if the pre-emption entry had not been subsequently canceled. But such cancellation had not been made when the act of congress granting land to the Northern Pacific Railroad Company was passed; it was made more than a year afterwards. As the land pre-empted then stood on the records of the land department, it was severed from the mass of the public lands, and the subsequent cancellation of the pre-emption entry did not restore it to the public domain so as to bring it under the operation of previous legislation, which applied at the time to land then public. The cancellation only brought it within the category of public land in reference to future legislation. This, as we think, has long been the settled doctrine of this Court. See also Northern Pacific Railroad Co. v. De Lacey (174 U. S. 622, 626).

Applying this ruling to the lands now in question, they were at the time of the grant to the Northern Pacific Railroad Company included within an existing and lawful withdrawal made in aid of a prior grant and were therefore not subject to sale or other disposition under general laws: They were not 'public lands' within the accepted meaning
12 of those words (Barker v. Harvey, 181 U. S., 481, 490) and were not within the terms of the grant to the Northern Pacific Railroad Company, which was of every alternate section of public land.'

While the decision in the case of United States v. Oregon and California Railroad Company, cited by appellant, gives color to appellant's contention, it must be remembered that in that case the lands in controversy were not reserved under the prior grant or at all until after the date of the later grant under which they were held to have passed. They were public lands at the time of the later grant which was held to have embraced them. The case of Bardon v. Northern Pacific R. R. Co., supra, and kindred cases, were not referred to in the opinion of the court, and it cannot be presumed that by any general discussion upon an immaterial point the court intended to overrule the Bardon and kindred cases.

That a right under the prior grant did not eventually attach to the lands here in question is immaterial, first, because the act of July 2, 1864, was a grant in praesenti, and second, be-

cause a reservation on account of a prior grant will defeat a later grant like that of July 2, 1864, whether the lands are needed in satisfaction of the prior grant or not. Northern Pacific R. R. Co. v. Musser-Sauntry Co. (168 U. S., 604).

Your office decision is accordingly affirmed."

And your orator shows that in pursuance of said decision by the secretary of the interior, the commissioner of the general land office formally and finally canceled said Duluth list No. 9.

XI.

And your orator further shows that thereafter, to-wit: On October 2, 1901, one Mary E. Coffin applied at the United States district land office at Duluth, Minnesota, to select the south half of the southeast quarter (S ½ S E¼) of section twenty-seven (27), township fifty-two (52) north, range fifteen (15) west, under the provisions of the act of Congress approved June 4, 1897, which said act provides that persons owning lands within the limits of certain forest reservations may relinquish such lands to the United States and select other lands in lieu thereof. That the selection so made by said Mary E. Coffin, as aforesaid, was wrongfully and unlawfully accepted by the register and receiver of said land office, and was by
13 them transmitted to the commissioner of the general land office for his examination and approval for patenting to said Mary E. Coffin, and that said selection is now pending before said Commissioner of the general land office awaiting such examination and approval.

XII.

And your orator shows that the selection so made by said Mary E. Coffin was accepted by the said register and receiver and will be accepted and approved by the commissioner of the general land office under a mistake of law founded upon the erroneous decision of the secretary of the interior hereinbefore set forth. That the accuracy of said decision, that is to say the question of whether or not the attempted reservation by the commissioner of the general land office of the lands coterminous with the line of general route of the said Lake Superior and Mississippi railroad operated to except said lands from the grant to the Northern Pacific Railroad Company, is the only question of law or fact at issue between your orator and the defendants herein.

XIII.

And your orator shows that the defendants herein, William O'Brien, Albert J. Lammers and George A. Lammers, claim

some right, title and interest in the land above described, or in the timber thereon, under and through said Mary E. Coffin.

XIV.

And your orator further shows that the said defendants, William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, claim that the said land hereinbefore described, and all thereof, was excepted from said grant to said Northern Pacific Railroad Company by reason of said
14 alleged withdrawal for the benefit of said Lake Superior and Mississippi Railroad Company, and that by reason thereof, and by reason of the facts hereinbefore stated, the same was subject to selection and location by said Mary E. Coffin, as hereinbefore set forth.

XV.

And your orator shows that the principal value of said land consists in the timber standing thereon, and that the value of said timber so standing thereon, exclusive of the land, exceeds the sum of two thousand dollars.

XVI.

And your orator shows that said land hereinbefore described is vacant and unoccupied.

XVII.

And your orator shows that the defendants herein threaten and intend, and will, unless restrained by the order of this honorable court, enter upon the above described land and cut and remove the timber therefrom and will entirely despoil said land of the timber thereon, and will thereby greatly impair and destroy the value of your orator's interest in said land and the timber standing thereon and so commit irreparable injury thereto and to your orator's interest therein.

For as much as your orator can have no adequate relief except in this court, and to the end that it may obtain the relief to which it is justly entitled in the premises, your orator now prays the court to grant to it a writ of subpoena of the United States, directed to the said defendants William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, requiring and commanding them to appear herein and answer, but not under oath, (an answer under oath being hereby expressly waived) the several allegations in this
15 your orator's bill contained.

And your orator further prays that your Honors may grant a writ of injunction issuing out of and under the seal

of this honorable court, perpetually enjoining and restraining the said defendants, William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, their agents, contractors, servants, workmen and employes from cutting or removing any trees or timber from the said south half of the southeast quarter (S ½ S.E. ¼) of section twenty-seven (27), township fifty-two (52) north, range fifteen (15) west, Minnesota.

And your orator prays that a provisional or preliminary injunction may be issued restraining the said defendants, their agents, contractors, servants, workmen and employes from cutting or removing any trees or timber from said land during the pendency of this cause.

JAMES B. KERR,
M. T. SANDERS,
Solicitors for Complainant.

State of Minnesota,
County of Ramsey—ss.

R. M. Weyerhaeuser, being first duly sworn, deposes and says: That he is an officer and agent of the above named complainant, to-wit: its manager; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true.

R. M. WEYERHAEUSER.

Subscribed and sworn to before me, this 26th day of December, 1902.

[Notarial Seal, Ramsey Co. Minn.]

P. HENDRICKSON,
Notary Public,
Ramsey County, Minnesota.

16 Indorsed: Bill of Complaint. Filed December 30th, 1902, Henry D. Lang, Clerk, By Thos. H. Pressnell, Deputy.

That further on the same day, to-wit: on the 30th day of December, A. D. 1902, there was filed with said Clerk A Praecipe for a Chancery Subpoena in said Cause, in the words and figures following, to-wit:

United States Circuit Court, for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers, and Mary E. Coffin, Defendants.

Praecipe for Chancery Subpoena.

To the Clerk of the above named Court:

Please issue chancery subpoena in the above entitled cause, together with a copy for service on the defendant, Mary E. Coffin, and deliver the same to the marshall for service.

JAMES B. KERR,
M. T. SANDERS,
Solicitors for Complainants.

Indorsed: Praecipe for Subpoena. Filed December 30th, 1902, Henry D. Lang, Clerk, By Thos. H. Pressnell, Deputy.

17 That still further on the same day, to-wit: On the 30th day of December, A. D. 1902, A Chancery Subpoena to Mary E. Coffin was issued by said Clerk and delivered to the United States Marshal, said District, for service; And that thereafter, to-wit: on the 6th day of January, A. D. 1903, said subpoena was returned into Court by said Marshal with his return of service attached thereto, and filed by said Clerk; which said Subpoena and Return are, in words and figures, as follows, to-wit:

United States of America, District of Minnesota, Fifth Division.

The President of the United States of America to Mary E. Coffin—Greeting:

You are hereby commanded to be and appear at Rules, to be held at the office of the Clerk of the Circuit Court of the United States, for the District of Minnesota, on the first Monday of February next, at the City of Duluth, then and there to answer the Bill of Complaint of Northern Lumber Company, A Corporation, and a citizen—of the State of Wisconsin, filed against you on the 30th day of December, A. D. 1902, hence fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 30th day of December, 1902.

Issued at my office in the City of Duluth, under the seal of said Circuit Court, the day and year last aforesaid.

[Seal of said Court] HENRY D. LANG, Clerk.
By Thos. H. Pressnell, Deputy.

18 Memorandum: The above named defendant to enter her appearance in this suit in the Clerk's office aforesaid, on or before the day at which this writ is returnable; otherwise the bill may be taken pro confesso.

HENRY D. LANG, Clerk.
By Thos. H. Pressnell, Deputy.

James B. Kerr and
M. T. Sanders,
Complainant's Solicitors.

Return on Service of Writ.

United States of America,
District of Minnesota—ss.

I hereby certify and return that I served the annexed Chancery Subpoena on the therein-named Mary E. Coffin by handing to and leaving a true and correct copy thereof with her personally at Duluth in said District on the 3d day of January, A. D. 1903.

WM. H. GRIMSHAW,
U. S. Marshal.
By Geo. J. Mallory, Deputy.

Indorsed: Chancery Subpoena. Returned into the Clerk's office and filed, January 6, 1903. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy.

That theretofore, to-wit: On the 31st day of December, A. D. 1902, there was filed with said Clerk an appearance by defendants William O'Brien, A. J. Lammers and Geo. A. Lammers, in said cause, in the words and figures following, to-wit:

Circuit Court of the United States, District of Minnesota, Fifth Division.

Northern Lumber Company, Complainant,
vs.
Wm. O'Brien, A. J. Lammers, Geo. A. Lammers and Mary E. Coffin, Defendants.

Appearance.

The Clerk will enter my appearance for the defendants Wm. O'Brien, A. J. Lammers and Geo. A. Lammers.

J. N. SEARLES,
Solicitor for Wm. O'Brien, A. J. Lammers & Geo. A. Lammers, Dfts.

19 Indorsed: Appearance by defendants, Wm. O'Brien, A. J. Lammers & Geo. A. Lammers, by J. N. Searles, Solicitor. Filed Dec. 31, 1902. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy.

That on the 2nd day of February, A. D. 1903, there was filed with said Clerk the answer of defendants Wm. O'Brien, A. J. Lammers and Geo. A. Lammers in said cause, in the words and figures following, to-wit:

United States Circuit Court, District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

(Answer.)

Now come William O'Brien, Albert J. Lammers and George A. Lammers, defendants above named, and answering the Bill of Complaint of the above named complainant, allege as follows:

1. These defendants admit the incorporation of the Northern Pacific Railroad Company as alleged in Sec. 1 of said Bill of Complaint.

2. These defendants admit that the said railroad company was granted, by the Act of Congress under which it was organized, certain lands, and allege that such grant was contained in the Third section of said Act, being the "Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, by the northern route", approved July 2, 1864—and, so far as material to this controversy was in words following:

"Sec. 3. That there be, and hereby is, granted to the "Northern Pacific Railroad Company,——every alternate sec- "tion of public land, not mineral, designated by odd numbers, "to the amount of twenty alternate sections per mile on each "side of said railroad line, as said company may adopt, through "the territories of the United States, and ten alternate sec- "tions of land per mile on each side of said railroad, whenever "it passes through any States, and whenever, on the line thereof, "the United States have full title, not reserved, sold, granted, "or otherwise appropriated and free from pre-emption, or other "claim or rights, at the time the line of said road is definitely "fixed, and a plat thereof filed in the office of the Commission "of the General Land Office; and whenever, prior to said time, "any of said sections, or parts of sections, shall have been "granted, sold, reserved, occupied by homestead settlers, or "pre-empted or otherwise disposed of, other lands shall be se- "lected by said company in lieu thereof, under the direction of "the Secretary of the Interior, in alternate sections, and desig-

"nated by odd numbers, not more than ten miles beyond the "limits of said alternate sections, provided, that if said route "shall be found upon the line of any other railroad route, to aid "in the construction of which lands have been heretofore granted "by the United States, as far as the routes are upon the same "general line the amount of land heretofore granted shall be "deducted from the amount granted by this Act"; and these defendants admit that said railroad company duly accepted the provisions of said act.

3. These defendants admit the facts alleged in Sections III and IV of the Bill of Complaint herein.

4. These defendants do not know and can not set forth as to their belief or otherwise whether the south half of the south-east quarter of Section Twenty-seven (27) Township Fifty-two (52) north, of Range Fifteen (15) west of the Fourth Principal Meridian is coterminus with and within twenty miles of that portion of said road from Thompson Junction to Ashland as definitely located; but these defendants deny that at the date of the aforesaid grant to said Northern Pacific Railroad Company, or at the time of definitely fixing the line of said road between Thompson Junction and Ashland, as aforesaid, the said land was public land of the United States not reserved or otherwise appropriated and free from other claim, and aver
21 that said land at both said periods were reserved and appropriated by the United States as hereinafter set forth to protect and secure a former grant by the United States made to the State of Minnesota for the benefit of the Lake Superior & Mississippi Railroad Company, as in the bill of complaint herein mentioned.

5. These defendants deny that by reason of any facts in said Bill of Complaint alleged, or otherwise, said Northern Pacific Railroad Company ever became the owner in fee simple, or of any interest or estate in the aforesaid tract or real property; and as to whether said company ever filed its list known as Duluth List No. 9, and if so for what purpose, or whether it included the aforesaid land these defendants do not know and can not set forth as to their belief or otherwise; and defendants have no knowledge, or information as to the various matters set forth in Section VII of the Bill of Complaint herein and therefore deny the same and each and all of the same, except that defendants admit the incorporation of complainant as therein alleged.

6. The defendants admit the passage by Congress and approval of an Act granting lands to the State of Minnesota for the purpose and as alleged in Section VIII of the Bill of Com-

plaint herein,—being the same set forth in full in Vol. 13 U. S. Statutes at Large, p. 64,—and admit that such grant became vested in the Lake Superior & Mississippi Railroad Company and that on the 7th day of May, 1864, said last named company filed in the office of the Commissioner of the General Land Office a map or diagram showing the general route of its railroad from St. Paul to a point on Lake Superior.

In and by said Act so granting lands to the State of Minnesota it was, among other things, provided that in case it should appear that the United States have when the line or route of said road is definitely fixed, sold, appropriated, reserved, or otherwise disposed of any sections, or any part thereof,
22 granted, as aforesaid, or that the right of pre-emption or homestead settlement had attached to the same then it should be the duty of the Secretary of the Interior to select other lands specified in lieu thereof, as more fully set forth in said Act, to which reference is made for a more full statement thereof.

These defendants admit that the Commissioner of the General Land Office under date of May 26th, 1864, transmitted to the Register and Receiver of the Land Office at Duluth, Minnesota, in which district said land was situate, a certain letter as set forth in said Bill of Complaint, but whether the "diagram A, marked Lake Superior and Mississippi Railroad" in said letter referred to as a part thereof was merely a copy of the map previously filed with said Commissioner by said Lake Superior & Mississippi Railroad Company, or that and more these defendants are not now able to say, for want of sufficient information to form a belief, and, consequently these defendants deny that said diagram so accompanying said letter of the commissioner was a mere copy of the aforesaid map of general location of the road of said Lake Superior & Mississippi Railroad Company.

These defendants aver that said letter of the Commissioner was duly received by said Register and Receiver by due course of mail and that the same with the accompanying map or diagram therein referred to as a part thereof clearly designated a tract of land twenty (20) miles in width lying on both sides of the aforesaid general location of the track or road of said Lake Superior & Mississippi Railroad and included the land in the Bill of Complaint referred to, and by said letter of instructions to said Register and Receiver and other proceedings by the proper authorities in the Department of the Interior the land in the said Bill of Complaint described became on said
23 May 26th, 1864, and ever after remained until the filing of map of definite location of the road of said Lake Superior & Mississippi Railroad on the 25th of September, 1886,

a full legal, distinct and valid withdrawal of said lands, including the land in controversy herein, from the mass of public lands afterwards referred to in the aforesaid Act granting lands to said Northern Pacific Railroad Company; and by reason of said withdrawal said land here in controversy never became subject to said grant to said Northern Pacific Railroad Company, and no interest therein ever passed under said last mentioned grant to this plaintiff, or any of its predecessors in interest or claim.

7. These defendants admit the allegations of facts contained in Section IX of the Bill of Complaint herein.

8. These defendants admit the several allegations of fact set forth in Sec. X of the Bill of Complaint herein, except that they do not know and can not set forth as to their belief or otherwise whether said "Duluth List No. 9" included the lands in controversy, and also except as to the alleged mistake of law made by the Commissioner of the General Land Office and the Secretary of the Interior, and in that regard defendants aver that no mistake of law was made by either of said officers in their said determinations, on the contrary both said determinations were in accordance with the law and facts governing the same; and defendants aver that such determinations were each made on an assumption of facts agreed upon by both this complainant and those under whom it claims herein as well as the said Commissioner and Secretary of the Interior, among which facts so assumed and agreed upon was the fact that the lands in question had been withdrawn for the benefit of the grant to the State of Minnesota hereinbefore referred to by the proceedings therefor, and that such proceedings were valid and effectual therefor, unless the subsequent grant to the Northern Pacific Railroad Company, hereinbefore referred to,
24 embraced as a matter of law, such land, regardless of their withdrawal as a matter of fact.

And these defendants aver that the Land Department of the United States has not, in the aforesaid proceedings, or others determined or ever been called upon to determine whether the proceedings for withdrawal of the land in question for the benefit of the aforesaid grant to the State of Minnesota were sufficiently definite and certain to accomplish that object, or whether—as alleged in Section VIII of the Bill of Complaint herein—the "map or diagram so transmitted by the Commissioner of the General Land Office to said Register and Receiver, was so vague, uncertain, indefinite and inaccurate that it is impossible for your orator (or any one) to determine whether or not the land hereinbefore described fell within the place or indemnity limits, as shown on said map or diagram; or that the

language of the attempted order of withdrawal as contained in said letter of May 26th, 1864, is so vague, uncertain and indefinite that your orator (or others) can not determine whether or not it was thereby intended to include within such attempted withdrawal the land hereinbefore described"; and defendants further aver that the sufficiency in point of fact or law of the said withdrawal proceedings is now first called in question, and the Commissioner of the General Land Office, nor the Secretary of the Interior have never determined or been called upon to determine the sufficiency of said withdrawal proceedings in point of fact or law, to take the land in question out of the grant to the Northern Pacific Railroad Company, except as aforesaid, for which reason defendants aver that this Court has no jurisdiction to determine this controversy.

9. These defendants admit the facts alleged in Sec. IX of the Bill of Complaint herein.

10. These defendants aver that they do not know and can not set forth their belief as to whether the facts alleged in Sec. X of the Bill of Complaint herein are true, except that they are informed and believe and on such information and belief admit that the Commissioner of the General Land Office and the Secretary of the Interior refused to approve Duluth List No. 9, for the reasons set forth in the decision of the Secretary of the Interior set forth in the Bill of Complaint herein in Sec. X aforesaid, and defendants aver that the land in controversy were in fact reserved for the Lake Superior & Mississippi Railroad Company at the date of the grant to the Northern Pacific Railroad Company and therefore excepted from the grant to the said last named company.

11. Further answering these defendants aver that Mary E. Coffin did apply at the United States Land Office at Duluth, Minn. on Oct. 2, 1901 to select the land in controversy herein under the provisions of the act of Congress approved June 4, 1897 as in Sec. XI of the Bill of Complaint herein, and her said application was accepted by the officers at said land office and the same duly remitted for further action to the General Land Office at Washington, D. C., and such application now remains in the General Land Office at Washington, D. C. for action and undetermined; and defendants aver that said Mary E. Coffin claims that she is entitled to have her said selection and application granted and allowed, but the same has not as yet been acted upon by the said Commissioner.

12. Afterwards and on the 25th of October, 1901 said Mary E. Coffin and Herbert W. her husband duly conveyed all her interest in the lands in question, by deed of special warranty, to

Ernest W. Jones, and Ben F. Gilbert, and the latter afterwards, to-wit, on the 25th day of October, 1901 duly conveyed to these defendants, for a valuable consideration actually paid the right to enter in and upon said lands and remove all the timber standing or being thereon any time within five years from date of said conveyance; and these defendants purchased said timber and took said conveyance in good faith, for full value actually paid at the time of such conveyance to them, without any notice or knowledge of the claim of this plaintiff or its grantor to any interest or estate in the said timber or the lands on which it is situate.

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13. These defendants admit that the value of the timber standing and being on the aforesaid land exceeds two thousand dollars.

14. Whether the aforesaid selection by said Mary E. Coffin of the land in controversy will be approved by the Commissioner of the General Land Office, or the Secretary of the Interior these defendants have no knowledge or information sufficient to form a belief and leave the complainant to make such proof thereof as it may be advised; but these defendants aver that the determination of the proper officer of the Land Department of the aforesaid application of said Mary E. Coffin involves, inter alia, a determination of what was done, as a matter of fact, by the Lake Superior & Mississippi Railroad Company and the Commissioner of the General Land Office as well as the Secretary of the Interior, in the matter of a withdrawal of the land in controversy from sale or other disposition by the United States at the time and prior to the grant to the Northern Pacific Railroad Company aforesaid, and such issue of fact, as these defendants are informed, believe and aver, has never been determined by the said Commissioner or Secretary, nor have they ever been called upon by complainant or others to determine what were the facts in that regard, and the determination of said officers referred to in Sec. X of the Bill of Complaint herein was confined solely to a determination of the legal effect of a legal withdrawal of the lands in controversy for the benefit of the grant to the Lake Superior & Mississippi Railroad Company—through the State of Minnesota, as trustee—assuming that such withdrawal was made, and these defendants claim, among other matters in this cause, that said land was legally withdrawn from and not included in the said grant to the Northern Pacific Railroad Company, under which this complainant deraigns title, if at all.

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15. These defendants admit that the land in controversy is vacant and unoccupied, and that they claim the right to enter

upon the same and remove the timber therefrom as authorized by the aforesaid permit granting to them as hereinbefore set forth.

16. These defendants further allege, on information and belief that neither the Northern Pacific Railroad Company, nor any of its successors in interest or claim to the title, legal or equitable to the property in controversy, including this complainant, have paid or tendered to the United States the cost of surveying, selecting and conveying the land in controversy, as required by the proviso to the Act of Congress, approved July 31, 1876—being Statutes at Large, p. 121—making appropriation for sundry civil expenses of the Government, etc., which declares,—

"That before any lands granted to any railroad company "by the United States shall be conveyed to such company, or "any persons entitled thereto under any acts incorporating or "relating to said company, unless such company is exempt by "law from the payment of such costs, there shall first be paid "into the Treasury of the United States the cost of surveying, "selecting and conveying the same by the said company or per-"sons in interest."

17. These defendants further aver that they have full, true and direct answer made to all and singular the matters contained in the Bill of Complaint herein, so far as they have any knowledge or information thereof.

Wherefore These defendants pray that it be adjudged
28 and decreed that complainant have no right, title or interest in or to any of the lands or timber thereon in controversy in this cause, and for such other and further relief as in equity may seem just and proper together with their reasonable costs and charges herein..

J. N. SEARLES,

Solicitor and Counsellor for the defendants William O'Brien, Albert J. Lammers and George A. Lammers.

State of Minnesota,
County of Washington—ss.

Geo. A. Lammers, being first duly sworn upon oath says that he is one of the defendants in the foregoing within entitled action; that the foregoing answer is true of his own knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

GEORGE A. LAMMERS.

Subscribed and sworn to before me this 31st day of January, 1903.

[Notarial Seal Washington Co. Minn.]

J. N. SEARLES,
Notary Public,
Washington County, Minn.

Indorsed: Answer. Filed February 2nd, 1903. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy.

That thereafter, to-wit: On the 2nd day of March, A. D. 1903, there was filed with said Clerk the Replication in said cause, in the words and figures following, to-wit:

Circuit Court of the United States, For the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

Replication of Northern Lumber Company.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefits and advantages of exception which may be had and taken to the manifold insufficiencies of the said answer, for replication thereto says that it will aver, maintain and prove its bill of complaint to be true, certain and sufficient in the law to be answered unto; and that said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by repliant without this; that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things the repliant is and will be ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

JAMES B. KERR,
Solicitor for Complainant.

Indorsed: Replication. Filed March 2, 1903. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk.

That thereafter, to-wit: On the 19th day of August, A. D. 1903, there was filed with said Clerk a Stipulation of facts in said cause, in the words and figures following, to-wit:

30 United States Circuit Court for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers, and Mary E. Coffin, Defendants.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that for the purpose of the trial of this cause the following facts may be taken to be true.

I.

That the Northern Pacific Railroad Company is a corporation created, organized and existing under and by virtue of an act of congress approved July 2, 1864, entitled: "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," and those certain acts and joint resolutions of congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act of congress said company was authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as should be determined by said company within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget sound, with a branch via the
31 Valley of the Columbia river to a point at or near Portland in the state of Oregon.

II.

That by the third section of said act of July 2, 1864, there was granted to said railroad company

"every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other

claims or rights, at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office." And the whole of said third section is hereby referred to and made a part of this stipulation.

That said railroad company duly accepted the terms, conditions and impositions of said act of congress, and thereafter proceeded with the work of surveying, definitely locating and constructing its said railroad and telegraph line.

III.

That on the 6th day of July, 1882 the said Northern Pacific Railroad Company duly filed in the office of the commissioner of the general land office, a certain map or plat, duly approved by the secretary of the interior, showing the line of definite location of that portion of its road extending from Thomson Junction in the State of Minnesota, eastwardly to Ashland in the State of Wisconsin.

IV.

That thereafter the said Northern Pacific Railroad Company duly definitely located the whole of its line of railroad extending from a point on Lake Superior in the state of Wisconsin, westwardly to a point on Puget sound, and thereafter duly constructed and completed its said railroad and telegraph line upon said line of definite location, in all respects as re-
32 quired by the provision of said act of congress of July 2, 1864.

V.

That the south half of southeast (S ½ S. E. ¼) of section twenty-seven (27), township fifty-two (52) north, of range fifteen (15) west of the fourth principal meridian, is co-terminous with and within twenty (20) miles of that portion of said road from Thomson Junction to Ashland so definitely located as aforesaid; that at the time the line of said railroad co-terminous with said land was definitely fixed as aforesaid said land was public land of the United States not reserved, sold, granted or otherwise appropriated, and was free from pre-emption or other claims or rights, and was non-mineral in character, and at the date of the grant to said Northern Pacific Railroad Company said land was public land of the United States and subject to said grant, unless the withdrawal for the benefit of the Lake Superior & Mississippi Railroad Company, as hereinafter set forth, operated to take said land out of the category of public lands at the time of the grant to the Northern Pacific Railroad Company.

VI.

That thereafter and on October 17, 1883, said company filed in the United States district land office at Duluth, Minnesota, its certain list known as Duluth List No. 9, wherein, among other lands, was listed the land above described, said listing being done for the purpose of bringing said lands formally before the officers of the interior department for examination and patenting to said company.

At the time of filing of said list No. 9 the said company paid the selection fees required by law and the regulations of the interior department, and thereafter, in the year
33 1888, said company paid the fees required by law for the surveying of said premises above described.

VII.

That in the year 1893 the Northern Pacific Railroad Company was insolvent and unable to pay the interest on certain bonds secured by mortgages on its lands and other property; and thereafter in a certain cause in equity commenced by the creditors of said railroad company for the foreclosure of said mortgages and for the sequestration and distribution of the property of said company for the benefit of the secured and unsecured creditors of said railroad company, receivers were appointed by the United States circuit court for the district of Minnesota of all the property of said railroad company, including the land hereinbefore described; that said circuit court so appointing said receivers duly authorized and directed them to sell the lands of the Northern Pacific Railroad Company situate in the State of Minnesota, and to make contracts and deeds therefor.

That thereafter, to-wit: on the 4th day of November, 1898, Edwin H. McHenry and Frank G. Bigelow, the receivers so appointed and empowered by said court as aforesaid, sold and conveyed by deed to Frederick Weyerhaeuser and John A. Humbird, all the right, title and interest of the Northern Pacific Railroad Company in and to the land hereinbefore described; and thereafter said Weyerhaeuser and Humbird, by their deed dated March 4, 1899, conveyed all their interest and estate thus acquired to the complainant, Northern Lumber Company, in all the timber standing and growing on the land above described.

That the Northern Lumber Company is a corporation organized and existing under the laws of the state of Wisconsin.

VIII.

That by an act of congress approved May 5, 1864
34 there was granted by the United States to the state of Minnesota, for the purpose of aiding in the construction of a railroad in said state from the city of St. Paul to the head of Lake Superior, every alternate section of public land of the United States, not mineral, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, within the State of Minnesota; and it was provided in said act that in case it should appear that the United States had, when the line of the road to be constructed under said act was definitely fixed, disposed of any of the lands in said alternate sections, other lands equal in amount to the lands so disposed of should be selected for said company within twenty miles from the line of said road. And for a complete statement of all the terms and provisions of said act of congress, reference is hereby made to said act as the same appears in volume thirteen (13) of the United States Statute at Large, at page 64. That thereafter the grant of lands so made by said act of congress became vested in the Lake Superior and Mississippi Railroad Company, which said company on May 7, 1864 filed in the office of the commissioner of the general land office map or diagram showing the general route of its said railroad from St. Paul to a point on Lake Superior.

That thereafter, and on May 26th, 1864, the commissioner of the general land office transmitted a copy of said map or diagram to the register and receiver of the United States district land office at Duluth, Minnesota, with a letter as follows:

"General Land Office,
May 26, 1864.

Register & Receiver,
Duluth, Minnesota.

Gentlemen: By the act approved May 5th, 1864, a grant of lands was made to the state of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior.

The Secretary of the Interior having approved of a
35 withdrawal of lands for said road, you will suspend from pre-emption, settlement and sale, a body of lands about twenty miles in width, as indicated on the inclosed diagram "A", marked 'Lake Superior and Mississippi Railroad.' Acknowledge the date of receipt of this.

Very respectfully, your ob't servant,

J. M. EDMONDS, Commissioner."

The "Exhibit A" hereunto attached is a true and correct copy of said map or diagram so filed by said Lake Superior and Mississippi Railroad Company on May 7, 1864, as aforesaid, a copy of which was transmitted by the commissioner of the general land office to the register and receiver of the United States district land office at Duluth, Minnesota, as hereinbefore set forth.

That the lands hereinbefore described lie co-terminous with and within ten miles of said line of general route, as defined by Exhibit "A"

That said letter of May 26th, 1864, so transmitted as aforesaid, was received by the local land officers at Duluth, Minnesota, by due course of mail and prior to July 2, 1864.

IX.

That thereafter, to-wit: on the 25th day of September, 1866, the said Lake Superior and Mississippi Railroad Company filed in the office of the commissioner of the general land office a map showing the definite location of its railroad from St. Paul to Duluth, on Lake Superior. That thereupon the commissioner of the general land office marked and designated upon the plats in his office the ten mile, or place, limits of said grant; the ten-twenty, or indemnity, limits of said grant; and also the terminal limits, beyond which said land grant did not extend.

That thereafter, and on November 2, 1866, the commissioner of the general land office transmitted a letter to the register and receiver of the United States district land office at
36 Duluth, Minnesota, in words and figures following, to-wit:

"Department of the Interior,
General Land Office,
Nov. 2, 1866.

Register and Receiver,
Duluth, Minn.

Gentlemen: Herewith is a diagram showing the line of route, as definitely located, of the Lake Superior and Mississippi Railroad, with the ten, twenty, and on the west side the thirty mile limits indicated thereon, Acts May 5, 1864, & July 13, 1866.

924 The odd sections within all three of these limits will be withdrawn from sale or location, pre-emption or homestead; except in so far as valid pre-emption claims may have accrued to the same, prior to the withdrawal of May 26, 1864, within the limits therein designated and prior to the receipt of this order outside of the limits fixed in that withdrawal.

As the Act of 1864 reserves from the grant any and all lands theretofore reserved, for the purpose of aiding in any object of internal improvement or for any other purposes whatsoever no reserved lands are subject to the operation of the grant.

You will mark the line of route with the several limits on the township plats in pencil, and you will report the fact of it having been done.

The railroad company will be required, first, to make their selections from the 10 and 20 mile limits, if it is then found that a deficiency exists, the same can be made up by selections from the 30 mile limit.

This order will take effect from the date of its receipt at your office & you will advise me of the precise time it may be received by you.

Very respectfully, Your Obt. Servant,

JOS. S. WILSON, Commissioner.

The even sections within the ten mile limits are increased in price to $2.50 per acre and will be subject at that rate to settlement and entry under the pre-emption & homestead laws; but no such sections can be entered at private sale until they shall have first been offered at public auction.

JOS. W. WILSON, Commissioner.

That the said south half of the southeast quarter (S ½ S.E. ¼) of section twenty-seven (27), township fifty-two (52) north, of range fifteen (15) west, Minnesota, is beyond or outside the northeastern terminus of said land grant, and is not within the place, indemnity, or any other limits of said grant, as shown by said map of definite location.

X.

That thereafter, and on the 19th day of March 1901,
37 the secretary of the interior transmitted to the commissioner of the general land office a letter in words and figures following, to-wit:

"Department of the Interior,
Washington. March 19, 1901.

The Commissioner of the
General Land Office.

Sir: The Department is in receipt of your office letter of February 14th last, requesting instructions as to the extent of the withdrawal ordered upon the map of probable route of the Lake Superior and Mississippi Railroad. This inquiry is made because of the decision of this Department in the case of Northern Pacific R. R. Co. v. Rooney (30 L. D. 403), wherein it was held that lands reserved on account of a grant made prior to the

grant of July 2, 1864 (13 Stat., 356), to the Northern Pacific Railroad Company, and continued in reservation until after the definite location of the line of the Northern Pacific road, are excepted from the Northern Pacific grant, but do not afford a basis for the selection of lands within the second indemnity belt of that grant, provision for which is made by the joint resolution of May 31, 1870 (16 Stat., 378).

It appears that on May 7, 1864, two days after the passage of the act of May 5, 1864 (13 Stat., 64), making a grant to aid in the construction of the Lake Superior and Mississippi Railroad, there was filed in your office by the Lake Superior and Mississippi Railroad Company a map of the probable route of its line of road, the same being accompanied by a request for a withdrawal of "the lands within the limits prescribed by said act of congress." The act provides for place limits of ten miles on each side of the line of road, and for indemnity limits of the next ten miles on each side thereof. On the same day your office submitted to the Secretary of the Interior the question whether the withdrawal, if made, should be of lands "within the ten mile limits only, or within both lim-
669 its." By letter of May 23rd, 1864, the delegation in Congress from Minnesota requested the Secretary of the Interior to direct a withdrawal of "lands along the probable line of said railroad for twenty sections in width." The Secretary of the Interior, by letter of May 26th, 1864, ordered your office to make a withdrawal of "A body of lands about twenty miles in width along the probable route of railroad, 'from St. Paul to Lake Superior' as indicated on the diagram submitted by your office." So far as can now be ascertained, the "diagram" referred to by the Secretary of the Interior is the map of probable route filed by said Company May 7, 1864. No other diagram is specifically mentioned in any of said letters, or found among the files. May 26, 1864, your office in a letter to the local office made a withdrawal of "a body of lands about twenty miles in width, as indicated on the enclosed diagram." This diagram is simply a reproduction of the map of probable route filed by said company. This map is a Minnesota state map of that period, upon which the probable route of said railroad is indicated by a black line drawn with pen and ink. Along and on
38 each side of this black line are two colored bands, one red and the other blue, which are probably intended to represent place and indemnity limits, but they are not so designated on the map, and their width is not stated. Measured according to the scale of the map, the red bands, corresponding to place limits, are about six miles in width on each side of the line of probable route, and the blue bands, corresponding to indemnity limits, are about nine miles in width on each side.

No specific mention of these colored bands is made in any of said letters and nothing upon the map of probable route indicates that such bands are intended, in any of themselves, to fix the extent of the withdrawal as requested or made, or that they are anything more than a mere approximation of place and in-
670 demnity limits. The withdrawal ordered by the Secretary of the Interior and made by the Commissioner of the General Land Office was of "a body of lands" about twenty miles in width." The place limits of ten miles on each side of the line of road provided for in the granting act, taken together, make a body of lands twenty miles in width. Measured according to the scale of the map here under consideration, the place limits supposed to be represented by the red bands make a body of lands about twelve miles in width, and the place and indemnity limits, supposed to be represented by the red and blue bands, taken together, make a body of lands about thirty miles in width. The objections to giving these colored bands controlling effect in determining the extent of said withdrawal are obvious and insuperable. Their width is not definite, and their purpose is not certain. The information which they disclose is not nearly so definite or certain as that conveyed by the terms of the letters ordering and making the withdrawal. They do not conform in width to the limits prescribed in the granting act, and, whether taken together or separately, do not constitute a body of lands of the width described in the withdrawal as ordered and made. Due regard can only be given to the terms of the granting act, the fact that the Secretary of the Interior in ordering the withdrawal was, in part at least, answering the inquiry of the Commissioner of the General Land Office as to whether the withdrawal should be of the lands in the place limits only, or of the lands in both place and indemnity limits, and to the terms of this withdrawal, by holding that the purpose and effect of the withdrawal was to withhold from disposition for the time being the lands which, if the line of probable route should become the line of definite location, would fall within the place limits of the grant and pass to the railroad company.

671 The withdrawal will be given effect accordingly.

Herewith are the papers.

Very respectfully,

E. A. HITCHCOCK, Secretary."

That thereafter, in the month of April, 1901, the said list known as Duluth list No. 9 filed by said Northern Pacific Rail-
road Company in the United States district land office
39 at Duluth, Minnesota, on October 17, 1883, as hereinbefore set forth, came before the commissioner of the general land office for examination and approval for patenting the lands to said company, but said commissioner, by his decision

of April 6, 1901, refused to approve said list, and rejected the same for the reason, as stated by him, that the lands therein described were reserved for the said Lake Superior and Mississippi Railroad Company at the date of the grant to said Northern Pacific Railroad Company, and were therefore excepted from the grant to said last named company. That from said decision by the commissioner of the general land office the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company appealed to the secretary of the interior, and the secretary of the interior refused to approve said list, but rejected the same, and rendered a decision, under date of July 16, 1901, in the words and figures following, to-wit:

"The Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, has appealed from your office decision of April 6, last, wherein it was held that certain described lands in the Duluth land district, Minnesota, and within the primary limits of the grant made by the act of July 2, 1864, (13 Stat., 365), in aid of the construction of the Northern Pacific Railroad, were excepted from the operation of said grant because they were, at the date of the passage of said act, within ten miles of the probable route of the Lake Superior and Mississippi Railroad in aid of the construction of which a grant was made by the act of May 5, 1864 (13 Stat., 64), and were embraced within the withdrawal of May 26, 1864, made on account of the last-mentioned grant.

Upon the adjustment of the limits of the grant made by the act of May 5, 1864, supra, to the line of definite location of the Lake Superior and Mississippi railroad, effected September 25th, 1866, by the filing and approval of the required map, the lands here in question were found to fall without said limits and were thereupon freed from said grant. The Northern Pacific Railroad was not definitely located opposite these lands until July 6, 1882, at which date they were free from adverse claim so far as shown by the record now before this department.

The appeal filed on behalf of the railway company is based upon the ground that the withdrawal of May 26, 1864, being a withdrawal upon a map of probable or general route, did not prevent congress from granting the lands so withdrawn in aid of the construction of the Northern Pacific railroad, and that they were included in the grant to that company made by the act of July 2, 1864, because falling without the limits of the grant made by the act of May 5, 1864, as established by the definite location of the Lake Superior and Mississippi railroad, no right ever attached to them under the earlier grant. The decision of the Court in the case of United States v. Oregon and California R. R. Co. (176 U. S., 28), is relied upon to sustain this claim.

In the case of Bardon v. Northern Pacific Railroad Co. (145 U. S., 535), one Robinson had settled upon a portion of an odd-numbered section within the limits of the grant made by the act of July 2, 1864, for which he filed a pre-emption declaratory statement on September 21, 1853. He died without making proof of payment under said filing, and on July 30, 1857, his heirs made payment for the land and certificates of purchase issued thereon. On August 5, 1865, said certificates and pre-emption filing were cancelled. In holding that said land was excepted from the operation of the grant here in question, it was said by the Court:

It is thus seen that when the grant to the Northern Pacific Railroad Company was made, on the 2nd day of July, 1864, the premises in controversy had been taken up on the pre-emption claim of Robinson, and that the pre-emption entry made was uncancelled; that by such pre-emption entry the land was not at the time a part of the public lands; and that no interest therein passed to that company. The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under the general laws. All lands, to which any claims or rights of others have attached, do not fall within the designation of public land. The statute also says that whenever, prior to the definite location of the route of the road, and of course prior to the grant made, any of the lands which would otherwise fall within it have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands are to be selected in lieu thereof under the direction of the Secretary of the Interior. There would therefore be no question that the pre-emption entry by the heirs of Robinson, the payment of the sums due to the government having been made, as the law allowed, by them after his death, took the land from the operation of the subsequent grant to the Northern Pacific Railroad Company, if the pre-emption entry had not been subsequently cancelled. But such cancellation had not been made when the act of congress granting lands to the Northern Pacific Railroad Company was passed; it was made more than a year afterwards. As the land pre-empted then stood on the records of the land department, it was severed from the mass of the public lands, and the subsequent cancellation of the pre-emption entry did not restore it to the public domain so as to bring it under the operation of previous legislation, which applied at the time to land then public. The cancellation only brought it within the category of public land in reference to future legislation. This, as we think, has long been the settled doctrine of this court.

See also Northern Pacific Railroad Company v. De Lacey (174 U. S. 622, 626).

41 Applying this ruling to the lands now in question, they were at the time of the grant to the Northern Pacific Railroad Company included within an existing and lawful withdrawal made in aid of a prior grant and were therefore not subject to sale or other disposition under general laws. They were not 'public lands' within the accepted meaning of those words (Barker v. Harvey, 181 U. S., 481 490) and were not within the terms of the grant to the Northern Pacific Railroad Company, which was of every alternate section of public land.'

While the decision in the case of United States v. Oregon and California Railroad Company, cited by appellant, gives color to the appellant's contention, it must be remembered that in that case the lands in controversy were not reserved under the prior grant or at all until after the date of the later grant under which they were held to have passed. They were public lands at the time of the later grant which was held to have embraced them. The case of Bardon v. Northern Pacific R. R. Co., supra, and kindred cases, were not referred to in the opinion of the court, and it can not be presumed that by any general discussion upon an immaterial point the court intended to overrule the Bardon and kindred cases.

That a right under the prior grant did not eventually attach to the lands here in question is immaterial; first, because the act of July 2, 1864, was grant in praesenti, and second, because a reservation on account of a prior grant will defeat a later grant like that of July 2, 1864, whether the lands are needed in satisfaction of the prior grant or not. Northern Pacific R. R. Co. v. Musser-Sauntry Co. (168 U. S. 604).

Your office decision is accordingly affirmed."

That in pursuance of said decision by the secretary of the interior, the commissioner of the general land office formally and finally cancelled said Duluth list No. 9.

XI.

That thereafter, to-wit: on October 2, 1901, one Mary E. Coffin applied at the United States district land office at Duluth, Minnesota, to select the south half of the southeast quarter (S 1/2 S. E. 1/4) of section twenty-seven (27) township fifty-two (52) north, range fifteen (15) west, under the provisions of the act of congress approved June 4, 1897, which said act provides that persons owning lands within the limits of certain forest reservations may relinquish such lands to the United States and select other land in lieu thereof. That the selection so made by said Mary E. Coffin, as aforesaid, was accepted by

the register and receiver of said land office, and was by them transmitted to the commissioner of the general land office
42 for his examination and approval for patenting to said Mary E. Coffin, and that said selection is now pending before said commissioner of the general land office awaiting such examination and approval.

It is further stipulated and agreed that it appears by the records of the Commissioner of the General Land Office, that all of section 27, township 57 north, range 15 west, situate in the Duluth District, Minnestoa, was offered for sale to the public, November 3rd, 1859, under proclamation of the President No. 643, and thereafter remained open to private sale or entry unless by reason of the matters and things hereinbefore set forth, it became lawfully withdrawn from sale or entry.

XII.

That the defendants herein, William O'Brien, Albert J. Lammers and George A. Lammers, claim some right, title and interest in the land above described, or in the timber thereon, under and through said Mary E. Coffin, and are entitled to all the rights to the timber here in controversy that said Mary E. Coffin ever possessed.

XIII.

That the principal value of said land consists in the timber standing thereon, and that the value of said timber so standing thereon, exclusive of the land, exceeds the sum of two thousand dollars.

XIV.

That said land hereinbefore described is vacant and unoccupied.

XV.

That the defendants claim the right, and intend to cut and remove the timber on the land above described.

XVI.

That said proceedings herein set forth are the only
43 proceedings had by the interior department involving the premises hereinbefore described.

JAMES B. KERR,
M. T. SANDERS,
Solicitors for Complainant.
J. N. SEARLES,
Solicitor for Defendants.

Dated: May 20th, 1903.

Indorsed: Stipulation of Facts. Filed June 15th, 1903. Henry D. Lang, Clerk. By Louise B. Trott, Deputy. Re-filed Aug. 19, 1903. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy.

44 EXHIBIT A.

W. K. M. 1902-213114
F. M. L. 134787 S. S. M.
4-207.

Department of the Interior.
General Land Office.
Washington, D. C. Jany. 8, 1903.

I, ..., Commissioner of the General Land Office, do hereby certify that the annexed map of the general route of the Lake Superior and Mississippi railroad filed in this office May 7, 1864, is a true and literal exemplification of the original now on file in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this Office to be affixed, at the City of Washington, on the day and year above written.

Seal of U. S. General Land Office.

(Signed) BINGER HERMANN,
Commissioner of the General Land Office.

FOLD OUT IS TOO LARGE TO BE FILMED

45 That thereafter, to-wit: On the 18th day of August, A. D. 1903, there was filed with said Clerk, A Decision of the Court directing the restraining and enjoining defendants from cutting or removing timber from the lands involved in said cause, in the words and figures following, to-wit:

United States Circuit Court, District of Minnesota, Fifth Division.

Northern Lumber Company,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin.

Decision.

This cause came on for final hearing June 15, 1903, upon the bill, the answer of the defendants William O'Brien, Albert J. Lammers and George A. Lammers, and the stipulation of facts on file; the Complainant appearing by James B. Kerr its solicitor, and the answering defendants by J. N. Searles their solicitor. The defendant Mary E. Coffin, though duly served with the Subpoena on the 3rd day of January, 1903, has never appeared in the suit, and is in default.

From the admissions in the pleadings and the Stipulated facts it appears that by an Act of Congress of May 5, 1864 (13 Stat. at Large, 64,) there was granted to the State of Minnesota, to aid in the construction of a railroad from St. Paul to the head of Lake Superior every alternate Section of public land of the United States, not mineral, designated by odd numbers to the amount of five alternate Sections per mile on each side of said railroad on the line thereof within said State.

46 Other provisions of the Act and affecting the terms of the grant do not affect the issues in this case. Said grant of land became vested in the Lake Superior and Mississippi Railroad Company, which on May 7, 1864, filed in the office of the Commissioner of the General Land Office, a map or diagram showing the projected general route of its railroad from St. Paul to a point on Lake Superior. On May 26, 1864, the said Commissioner transmitted a copy of said map or diagram to the register and receiver of the U. S. Land office at Duluth, Minnesota, with his letter informing them of the fact that the Secretary of the Interior had approved the withdrawal of the lands for the railroad, and directing them "to suspend from pre-emption settlement and sale, a body of lands about twenty miles in width as indicated on the enclosed diagram 'A' marked Lake Superior and Mississippi Railroad." The land in dispute, the South half of the South east quarter of Section twenty-seven (27) township fifty-two (52) North, of

Range fifteen (15) West, of the fourth principal Meridian, was co-terminous with and within ten miles of the general route of said railroad, as shown by the said map or diagram. Afterwards on the 25th day of September 1866 said Lake Superior and Mississippi Railroad Company filed in the office of said Commissioner of the General Land Office its map of the definite location of its said railroad from St. Paul to Duluth on Lake Superior; whereby it appeared and became definitely settled, that the land above described, and here in dispute was and is beyond and outside of any lands which could pass to or be obtained by the said railroad company under any of the terms of said land grant.

The Northern Pacific Railroad Company was created by Act of Congress of July 2, 1864, (13 Stat. at Large 365.) and authorized to construct and operate a continuous railroad and telegraph line from a point on Lake Superior in Minnesota or Wisconsin, westerly, within the United States and
47 North of the 45th parallel of latitude, to Puget Sound, with a branch by the Valley of the Columbia River to Portland, Oregon. It was granted every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as the company might adopt, through territories of the United States, and ten alternate sections per mile on each side of the railroad whenever it passed through any State. "Whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General land office."

The Northern Pacific Railroad Company afterwards definitely located its entire line from Ashland on Lake Superior in Wisconsin, to Puget Sound; and constructed and completed thereon its railroad and telegraph lines. In doing this, on July 6, 1882, it duly filed in the office of the Commissioner of the General Land Office, a map or plat duly approved by the Secretary of the Interior, showing the line of definite location of its said railroad from Thomson Junction in Minnesota to Ashland. On that same date the land here in dispute was and is co-terminous with and within twenty miles (ten alternate sections) of that portion of said railroad so definitely located between Thomson Junction and Ashland; and was public land of the United States, not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other claims or rights, and non-mineral in character. The same land was also at the date of said grant to the Northern Pacific Railroad

Company, public land of the United States, and subject to that grant, unless the said withdrawal of lands by direction
48 of the Secretary of the Interior, for the benefit of the Lake Superior and Mississippi Railroad Company, as above set forth, operated to take said lands out of the category of public lands so granted to the Northern Pacific Railroad Company.

On October 17, 1883, said Northern Pacific Railroad Company filed in the U. S. Land Office at Duluth its certain list, known as Duluth List No. 9, wherein, among other lands, was listed the land in dispute, to bring such lands before the officers of the Interior Department for examination and patenting to that railroad company; which had at the time of filing said list paid the selection fees and fees for surveying said land. On April 6, 1901, the Commissioner of the General Land Office refused to approve said List No. 9, and rejected the same for the alleged reason that at the date of said grant to the Northern Pacific Railroad Company, the lands described in said list were reserved for the Lake Superior and Mississippi Railroad Company by said order of withdrawal and were therefore not included in the grant. Upon appeal to the Secretary of the Interior said ruling and decision of the Commissioner of the General Land Office was affirmed July 16, 1901.

In the year 1893, said Northern Pacific Railroad Company became insolvent; and in a suit in this Court to foreclose Mortgages upon its lands, property and franchises; and for the Sequestration and distribution of its property for the benefit of its creditors Secured and unsecured, Edward H. McHenry and Frank G. Bigelow were by this Court duly appointed receivers of all the property of said railroad company, and among other things authorized to sell the lands of said railroad company in Minnesota and to make contracts and deeds therefor; and on November 4, 1898, said receivers sold and conveyed by deed to Frederick Weyerhauser and John A. Humbird all the right, title and interest of the Northern Pacific Railroad
49 Company in said land here in dispute; and the said Weyerhauser and Humbird on March 4, 1899 conveyed to the Northern Lumber Company, a Wisconsin Corporation, the complainant herein, all their interest and estate thus acquired, in and to all the timber standing and growing on the land in dispute; which timber is of the value of more than two thousand dollars. All of Section 27, township 57 North, Range 15 West, being the section containing the land here in dispute, was on November 3, 1859, offered for sale to the public, under proclamation of the President, No. 643, and ever since has remained open to private sale or to entry unless withdrawn by reason of the matters hereinbefore stated.

On October 2, 1901, defendant Mary E. Coffin applied at the U. S. Land Office at Duluth to select the land here in dispute under the act of Congress of June 4, 1897, in lieu of lands relinquished by her within a forest reservation. Such selection was accepted by said register and receiver and transmitted by them to the Commissioner of the General Land Office for his examination and approval for patenting such land to said Mary E. Coffin; and the matter of said selection is still pending before said Commissioner, awaiting such examination and approval.

The principal value of said land is the timber thereon. The defendants William O'Brien, Albert J. Lammers and George A. Lammers have duly acquired from said Mary E. Coffin all her rights in and to that timber and intend to cut and remove the same as charged in the bill.

It therefore appears that the title to the land here in dispute is still in the United States, and while the legal title remains in the United States it can not be adjudged in a suit to which the United States is not a party that any one else has a valid equitable claim to the land. The disposition of the public lands, conformably to the acts of Congress, is vested exclusively in the Land department of the government; which must incidentally determine the rights of claimants. So long as the land is not patented it remains under the jurisdiction of the Land department, which has still the only power to correct any errors it may have made in respect to any application or contest concerning the lands. It is only after patent has issued, and the jurisdiction of the Land department has become exhausted, that a Court of Equity will take any cognizance of the question of who is entitled to the land so patented, upon the facts found by the officers of the Land department. Johnson v. Towsley, 13 Wall, 72. Samson v. Smiley, ibid. 91; Marquez v. Frisbie, 101 U. S. 473; Humbird v. Avery, 110 Fed. 465, 471. Complainants right to the timber on the land rests on the equitable claim of the Northern Pacific Railway Co. to the land, and the right of the answering defendants rests on the equitable claim of Mary E. Coffin to the same land, and these are matters still within the sole jurisdiction of the Land department to determine, and in respect to which this court can give no judgment.

It appearing however that the claims of the Complainant and of the answering defendants to the timber upon the land in dispute are made in good faith, and upon colorable grounds, and that such defendants have threatened and propose to cut and remove said timber, it is proper in order to preserve the rights of the Complainant that such defendant should be enjoined and restrained from cutting or removing such timber until patent

for such land shall have been issued by the United States; and until the further order of this Court.

51 Decree will be entered accordingly, but without costs.

WM. LOCHREN, Judge.

Indorsed: Decision restraining and enjoining defts. from cutting or removing timber &c. Filed August 18th, 1903. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy.

That on the 21st day of December, A. D. 1903, there was filed with said Clerk A Petition by Complainant for leave to file a supplemental Bill in said Cause, in the words and figures following, to-wit:

United States Circuit Court, for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

Petition for Leave to File Supplemental Bill.

The petition of the Northern Lumber Company, the above named complainant, respectfully shows that on or about the 29th day of December, 1902, your petitioner filed its bill in this court against the defendants William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin for the purpose of obtaining the decree of this court restraining said defendants from cutting or removing the trees and timber upon the

52 south half of the southeast quarter of section 27, township 52 north, range 15 west of the fourth principal meridian, and praying in the words and figures as follows, to-wit:

"For as much as your orator can have no adequate relief except in this Court, and to the end that it may obtain the relief to which it is justly entitled in the premises, your orator now prays the court to grant to it a writ of subpoena of the United United States, directed to the said defendants William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, requiring and commanding them to appear herein and answer, but not under oath, (an answer under oath being hereby expressly waived), the several allegations in this your orator's bill contained.

"And your orator further prays that your Honors may grant a writ of injunction issuing out of and under the seal of this honorable court, perpetually enjoining and restraining the said defendants, William O'Brien, Albert J. Lammers, George A. Lam-

mers and Mary E. Coffin, their agents, contractors, servants, workmen and employes from cutting or removing any trees or timber from the said south half of the southeast quarter (S ½ SE ¼) of section twenty-seven (27), township fifty-two (52) north, range fifteen (15) west, Minnesota.

And your orator prays that a provisional or preliminary injunction may be issued restraining the said defendants, their agents, contractors, servants, workmen and employes from cutting or removing any trees or timber from said land during the pendency of this cause."

Your petitioner further shows that the said Mary E. Coffin though being duly served with process of subpoena herein made no appearance to said bill and is now in default herein, but that said William O'Brien, Albert J. Lammers, and George A. Lammers entered their voluntary appearance by J. N. Searles, Esq., their solicitor; that thereafter such proceedings were had upon said bill that an answer was filed by said appearing defendants and a replication thereto by your petitioner and the cause heard upon an agreed statement of facts, whereupon William Lochren, one of the judges of this court, filed an opinion in writing holding that until the issuance of a patent for said land the court was without jurisdiction to finally determine the rights of the parties in and to said premises, but that it was proper that the defendants should be enjoined and restrained
53 from cutting and removing the timber from said premises until the issuance of said patent but no decree has yet been entered in pursuance of said decision; that after the filing of this decision and on or about the 16th day of November, 1903, the officers of the United States executed and issued a patent to the defendant Mary E. Coffin purporting to convey the premises above described.

Your petitioner therefore prays that leave may be granted to it to file a supplemental bill against the said William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin setting forth the execution and issuance of said patent and with such prayer for relief as may be proper in the premises.

JAMES B. KERR, &
M. T. SANDERS,
Solicitors for Petitioner.

Indorsed: Petition to file Supplemental Bill. Filed December 21, 1903. Henry D. Lang, Clerk. By Louise B. Trott, Deputy.

That on the 16th day of May, A. D. 1904, there was filed with said Clerk a Stipulation for the filing of a Supplemental Bill in said cause, in the words and figures following, to-wit:

United States Circuit Court, for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lam-
54 mers and Mary E. Coffin, Defendants.

Stipulation.

It is hereby stipulated by and between the complainant and the defendants William O'Brien, Albert J. Lammers and George A. Lammers, by their respective solicitors, that an order may be entered herein permitting the complainant to file a supplemental bill herein in the words and figures of the copy attached hereunto, and that thereafter the cause shall proceed to hearing upon the pleadings thereto without objection or exception to the right of said complainant to proceed herein by supplemental bill.

Dated May 3, 1904.

C. W. BUNN,
JAMES B. KERR,
Solicitors for Complainant.
J. N. SEARLES,
Solicitor for defendants William O'Brien, Albert J. Lammers and George A. Lammers.

Indorsed: Stipulation and Supplemental Bill. Filed May 16th, 1904. Henry D. Lang, Clerk. By Louise B. Trott, Deputy.

That on the same day, to-wit: On the 16th day of May, A. D. 1904, there was filed with said Clerk An Order of Court granting leave to file a Supplemental Bill in said Cause, in the words and figures following, to-wit:

55 Circuit Court of the United States, for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

The petition of the complainant above named, for leave to file a supplemental bill herein, coming on to be heard, and it appearing to the court that the defendant Mary E. Coffin, was duly served with process of subpoena herein upon the original bill of complaint, but has made no appearance herein: and it appearing that the defendants William O'Brien, Albert J. Lammers and George A. Lammers have by written stipulation,

signed by their solicitor filed herein, consented to the entry of an order permitting the filing of such supplemental bill herein:

It Is Now Ordered: That the complainant be, and it is hereby permitted to file its supplemental bill, as prayed in its said petition, and upon the filing of such supplemental bill herein on or before the 23rd day of May, 1904, the said defendants William O'Brien, Albert J. Lammers and George A. Lammers and Mary E. Coffin, are hereby required to plead to said supplemental bill on or before the 6th day of June, 1904.

By the Court,

WM. LOCHREN, Judge.

Dated May 16th, 1904.

56 Indorsed: Order permitting the filing of Supplemental Bill, &c. Filed May 16th, 1904. Henry D. Lang, Clerk. By Louise B. Trott, Deputy.

That attached to the Stipulation for the filing of a Supplemental Bill in said Cause was the proposed Supplemental Bill in the words and figures following, to-wit:

United States Circuit Court, for the District of Minnesota. Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

Supplemental Bill.

To the Honorable, the Judges of the United States Circuit Court for the district of Minnesota, in Equity sitting:

Your orator, Northern Lumber Company, shows to your honors that on or about the 29th day of December, 1902 your orator exhibited its original bill of complaint in this court against William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, the defendants hereinafter named as defendants thereto, and in and by said original bill of complaint your orator averred that the Northern Pacific Railroad Company was a corporation organized under the laws
57 of the United States authorized to construct and maintain a railroad from a point on Lake Superior to some point on Puget Sound, and that by an act of Congress of the United States approved July 2nd, 1864 lands were granted to said Railroad Company to aid in the construction of said railroad to the extent of every alternate section of public land, not mineral, designated by odd numbers to the amount of

twenty alternate sections per mile on each side of said railroad line, as said company might adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it should pass through any state, and whenever on the line thereof the United States should have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights when the line of said road should be definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.

Your orator further shows that in said original bill of complaint it alleged that said railroad company duly and definitely located said railroad and particularly that portion thereof extending from Thompson Junction in the state of Minnesota easterly to Ashland in the state of Wisconsin on the 6th day of July, 1882, and that thereafter said company duly constructed the whole of said line of railroad, as required by the provisions of said act of July 2nd, 1864.

Your orator further shows that in and by said original bill of complaint your orator alleged that the south half of the southeast quarter of section 27, township 52 north, of range 15 west of the Fourth Principal Meridian was and is opposite to and within twenty miles of that portion of said road so located and [constructeded] from Thompson Junction to Ashland and at the date of said grant and the date of said
58 definite location was public land of the United States not reserved or otherwise appropriated and was and is non-mineral in character, and that on October 17th, 1883 said Northern Pacific Railroad Company listed said land as a part of its land grant in the United States district land office at Duluth, Minnesota.

Your orator further shows that in and by said original bill of complaint it alleged that your orator succeeded by purchase to the rights of said Northern Pacific Railroad Company in and to the lands above described.

Your orator further shows that in and by said original bill of complaint your orator alleged that a certain grant of lands made by act of congress of the United States approved May 5th, 1864 to the state of Minnesota was conferred upon the Lake Superior and Mississippi Railroad Company, a corporation, and that said last named company on May 7th, 1864 filed in the office of the Commissioner of the General Land Office a map or diagram showing the general route of its railroad from St. Paul to a point on Lake Superior, and that thereafter and on May 26th, 1864, the Commissioner of the General Land office transmitted to the United States district land officers at

Duluth a letter directing said district land officers to withdraw from pre-emption, settlement and sale a certain body of lands therein referred to and indicated upon an accompanying diagram, but that said attempted withdrawal of lands was wrongful and without authority of law.

Your orator further shows that in and by said original bill of complaint it alleged that thereafter and on September 25th, 1866 the Lake Superior and Mississippi Railroad Company definitely located its line of railroad from St. Paul to a point on Lake Superior and filed a map thereof in the office of the Commissioner of the General Land office, and that
59 thereupon said Commissioner defined the limits of said land grant and that the lands above described, namely: the south half of the southeast quarter of section 27, township 52 north, of range 15 west of the fourth principal meridian fell wholly outside and beyond the limits of said grant, and your orator further shows that in and by said original bill of complaint it was alleged that the list of said Northern Pacific Railroad Company covering the lands above described came before the Commissioner of the General Land Office for examination and approval for patenting in the month of April, 1901, but said Commissioner, acting under a mistake of law refused to approve said list and rejected the same and held that the land above described was excepted from the said grant to said Northern Pacific Railroad Company by reason of the pretended withdrawal for the benefit of said Lake Superior and Mississippi Railroad Company.

Your orator further shows that in and by said original bill of complaint it alleged that on October 2nd, 1901, the defendant, Mary E. Coffin applied to select the land above described under the provisions of the act of congress approved June 4th, 1897, authorizing the selection of public lands in lieu of lands relinquished to the United States within the limits of certain forest reservations. That the said selection of said defendant Coffin was wrongfully and unlawfully accepted by the register and receiver of said district land office and transmitted to the Commissioner of the General Land office for his examination and approval, and at the time of filing said original bill said selection by said defendant Coffin was pending before the Commissioner awaiting his examination and approval.

And your orator further shows that in and by said original bill of complaint it was alleged that said selection by
60 said defendant Coffin was accepted by said register and receiver solely by reason of the erroneous decision of the Secretary of the Interior hereinbefore referred to, and that the accuracy of said decision and the effect of said pretended

reservation for the benefit of the Lake Superior and Mississippi Railroad Company was the only question of law or fact at issue between your orator and the defendants named in said original bill of complaint.

And your orator further shows that in and by said original bill of complaint it was alleged that the defendants named therein, namely: William O'Brien, Albert J. Lammers, George A. Lammers claimed some right, title and interest in the land above described or in the timber thereon under and through said Mary E. Coffin, and that said defendants and each of them claimed that said land was excepted from said grant to the Northern Pacific Railroad Company.

And your orator further shows that in and by said original bill of complaint it was alleged that the principal value of said land consisted in the timber standing thereon, and that the value of said timber, exclusive of the land, exceeded the sum of two thousand dollars, and that said land was vacant and unoccupied, and the said defendants threatened and intended, and would unless restrained by the order of this Court, enter upon said land and cut and remove the timber therefrom and impair and destroy the value of the orator's interest in said land and said timber.

And your orator further shows that said original bill of complaint concluded with a prayer for relief in the words and figures as follows:

"For as much as your orator can have no adequate relief except in this court, and to the end that it may obtain the relief to which it is justly entitled in the premises, your orator now prays the Court to grant to it a writ of subpoena of the United States, directed to the said defendants William
61 O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, requiring and commanding them to appear herein and answer, but not under oath (an answer under oath being hereby expressly waived) the several allegations in this your orator's bill contained.

And your orator further prays that your honors may grant a writ of injunction issuing out of and under the seal of this honorable court, perpetually enjoining and restraining the said defendants, William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, their agents, contractors, servants, workmen and employes from cutting or removing any trees or timber from the said south half of the southeast quarter (S ½ S. E. ¼) of section twenty-seven (27) township fifty-two (52) north, range fifteen (15) west, Minnesota.

And your orator prays that a provisional or preliminary injunction may be issued restraining the said defendants, their agents, contractors, servants, workmen and employes from cutting or removing any trees or timber from said land during the pendency of this cause."

And your orator further shows that the defendant Mary E. Coffin was duly served with process of subpoena but has made no appearance herein, and that on the 30th day of December, 1902 the defendants William O'Brien, Albert J. Lammers and George A. Lammers caused their voluntary appearance to be entered herein by their solicitor, J. N. Searles, Esq., and thereupon and on January 12th, 1903, in pursuance of an order of this court made in that behalf on January 12th, 1903, a writ of injunction issued against said defendants and all and each of them restraining them and all persons claiming under them from cutting or removing any of the timber standing upon said premises until the further order of the court, and in and by said order so directing the issuing of said injunction it was further ordered that if within thirty days from the date of the entry thereof the said defendants William O'Brien, Albert J. Lammers and George A. Lammers should execute under their respective hands and seals an instrument in writing approved by the judge of said court binding said William O'Brien, Albert J. Lammers and George A. Lammers, jointly and severally, to pay to your orator the sum of $3500 Dollars in the event that any of the trees or timber standing on said premises should be cut or removed by said defendants or any of
62 them, or any persons claiming under them or any of them, if it be finally held in this cause that the complainant is the owner of said premises and the trees and timber standing thereon, and should file such instrument in writing with the clerk of this court, then the writ of injunction thereby ordered to be issued should be forthwith recalled, vacated and annulled.

And your orator further shows that within the thirty days specified in said order of January 12th, 1903 such instrument in writing so required by said order was duly filed with the clerk of this court.

Your orator further shows that said defendants William O'Brien, Albert J. Lammers and George A. Lammers thereafter filed their joint and several answer to said original bill of complaint therein they aver, among other things, that said land described above was excepted from the grant of said Northern Pacific Railroad Company and that your orator was without title thereto or interest therein.

And your orator further shows that a replication was duly filed by your orator to the said answer of said defendants, and thereafter an agreed statement of facts signed by the respective solicitors for the complainant and the answering defendants was duly filed herein and upon said stipulation of facts and upon the pleadings herein said cause came on for hearing and on the 18th day of August, 1903 an opinion in writing was filed herein by the Honorable William Lochren, one of the judges of said court, wherein a conclusion was set forth that in as much as no patent for said land had been issued by the United States the court was without jurisdiction to finally determine the rights of the parties, and it was further decided
63 that the clams of both the complainant and the answering defendants were made in good faith and upon colorable grounds, and that in as much as said defendants had threatened and proposed to cut and remove said timber it was proper in order to preserve the rights of the complainant that said defendants should be enjoined and restrained from cutting or removing the said timber until patents for said land shall have been issued by the United States and until the further order of this Court, and it was determined that a decree should be entered in accordance with such conclusion but without costs.

Your orator further says that no decree has yet been entered herein and that no further proceedings have been taken in said cause.

And your orator further shows by way of supplement that since the hearing in said cause the officers of the United States have executed and issued a patent of the United States to the defendant Mary E. Coffin upon her said selection hereinbefore set forth purporting to convey to said Mary E. Coffin the said south half of the southeast quarter of section 27, township 52 north, range 15 west of the fourth principal meridian, and that said patent bears date the 16th day of November, 1903.

And your orator prays that you- Honors may grant a writ of injunction issuing out of and under the seal of this honorable court perpetually enjoining and restraining the said defendants William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, their agents, contractors, servants, workmen and employes, or any person claiming under them or either of them, from cutting or removing any trees or timber from the said south half of the southeast quarter of section twenty-seven (27), township fi-ty-two (52) north, range fifteen

(15) west of the fourth principal meridian, and your orator prays that it may have the same relief against the said
64 defendants above named that it might have had if the facts hereinbefore stated by way of supplement had been stated in your orator's original bill of complaint.

And your orator prays that the said defendants and each of them may be required to make answer, but not under oath (an answer under oath being hereby expressly waived) to the several allegations in this, your orator's supplemental bill contained.

C. W. BUNN &
JAMES B. KERR,
Solicitors for complainant.

United States of America
State of Minnesota
County of Carlton—ss.

R. M. Weyerhaeuser, being first duly sworn, deposes and says that he is an officer and agent of the above named complain-t, to wit: its manager; that he has read the above supplemental bill of complaint and knows the contents thereof and that the same is true.

R. M. WEYERHAEUSER.

Subscribed and sworn to before me this 21st day of December, 1903.

[Notarial Seal] FRANK B. POOLE,
Notary Public Carlton County, Minnesota.

65 That on the 5th day of July, A. D. 1904, there was filed with said Clerk the answer of defendants Wm. O'Brien, A. J. Lammers and Geo. A. Lammers to the supplemental bill in said cause, in the words and figures following, to-wit:

Circuit Court of the United States for the District of Minnesota Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

Now comes William O'Brien, Albert J. Lammers and George A. Lammers, defendants and answering the Supplemental Bill herein as alleged, as follows:

I.

These defendants admit the allegations of the complainant's Supplemental Bill herein, so far as relates to the general nature and character of the original bill of complaint herein, the original answer of the defendants and the original replication of the complainant thereto, and also as to the subsequent proceedings by way of stipulation of facts and the subsequent order for judgment herein, and allege that the facts heretofore stipulated upon which the foregoing order for judgment was based, represented all of the facts and issues submitted to this court on the original pleadings herein.

66 II.

Further answering, these defendants aver on information and belief, that prior to the making of the decision entered upon the hearing of the Original Bill, answer and replication, patent has issued from the United States to said Mary E. Coffin on her aforesaid application to enter the same, but these defendants aver on information and belief that this complainant requested the issue of said patent by the United States to said Mary E. Coffin, and to facilitate and procure the issue thereof this complainant completed the necessary proofs to be made by the said Mary E. Coffin to entitle her to said patent; that is to say, this complainant furnished a certificate of the County Clerk of Sheridan County, Wyoming, where the base land for her selection of the lands in controversy under the so-called Forest Reserve Scrip were situated, to the effect that no taxes on said lands so surrendered by said Mary E. Coffin to the United States as a basis for her selection of the lands in controversy remained unpaid. And defendants aver on information and belief that the said patent would not have issued to the said Mary E. Coffin had it not been for the active cooperation, assistance and request of this complainant, as aforesaid.

Wherefore these defendants pray that they may be hence dismissed with their costs and disbursements.

J. N. SEARLES,
Solicitor of the defendants, William O'Brien, Albert J. and George A. Lammers, Stillwater, Minn.

State of Minnesota,
County of Washington—ss.

George A. Lammers being first duly sworn upon oath, says that he is one of the defendants in the foregoing within entitled action; that the foregoing answer is true of his own

67 knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

GEORGE A. LAMMERS.

Subscribed and sworn to before me this 2 day of July, 1904.
[Notarial Seal .....
Washington Co. Minn.] Notary Public,
Washington County, Minn.

Indorsed: Answer to Supplemental Bill. Filed July 5, 1904. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

That on the 30th day of July, 1904, there was filed with said Clerk the Replication of Complainant to the answer to the Supplemental Bill of Complainant in said cause, in the words and figures following, to-wit:

Circuit Court of the United States for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

Replication of Northern Lumber Company.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefits and ad-
68 vantages of exception which may be had and taken to the manifold insufficiencies of said answer, for replication thereto says that it will aver, maintain and prove its bill of complaint to be true, certain and sufficient in the law to be answered unto; and that said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by repliant without this; that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things the repliant is and will be ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

JAMES B. KERR.
Solicitor for Complainant.

Indorsed: Replication to Answer to Supplemental Bill. Filed July 30th, 1904. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

That on the 15th day of August, 1904, there was filed with said Clerk an Order of Court fixing the time in which to take testimony in said cause, in the words and figures following, to-wit:

Circuit Court of the United States for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

69 The motion of the Complainant herein for an order fixing the time for taking of the testimony by the respective parties upon the issues raised herein by the pleadings, coming on to be heard, James B. Kerr, Esq. appearing for complainant, and J. N. Searles appearing for the defendants, William O'Brien, Albert J. Lammers, George A. Lammers;

It is ordered that the defendants have until the 30th day of September, 1904, within which to take testimony in support of their answer to the supplemental bill herein, and that the complainant have until 31st day of October thereafter within which to take testimony in rebuttal.

By the Court,

WM. LOCHREN, Judge.

Dated St. Paul, Minn. August 15th, 1904.

Indorsed: Order fixing time to take testimony. Filed August 15th, 1904. Henry D. Lang, Clerk. By E. Catherine Neff. Deputy.

That on the 16th day of January, A. D. 1905, there was filed with said Clerk a Stipulation setting the date for the final hearing of said Cause, in the words and figures following, to-wit:

Circuit Court of the United States for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
70 William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin.

It is Hereby Stipulated by and between the parties to the above entitled cause that the same may be set down for final hearing at the Circuit Court Room in the City of St. Paul on

the 16th day of January, 1905, at 10 o'clock in the forenoon and that an order to that effect may be entered herein upon this stipulation.

JAMES B. KERR,
Solicitor for Complainant.
J. N. SEARLES,
Solicitor for Defendants, William O'Brien, Albert J. Lammers, and George A. Lammers.

Dated,

Indorsed: Stipulation setting date of final hearing. Filed January 16th, 1905. Henry D. Lang, Clerk.

That further on the 16th day of January, A. D. 1905, there was filed with said Clerk An Order of Court setting the case for hearing in the words and figures following, to-wit:

Circuit Court of the United States, District of Minnesota, Fifth Division.

Northern Lumber Company, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

71 The court having made an order herein on the 15th day of August, 1904, fixing the time for the taking of testimony by the respective parties upon the issues raised by the supplemental bill of complaint, the answer and the replication, and the defendants being required by said order to take testimony in support of said answer to the supplemental bill on or before the 30th day of September, 1904, the complainant having thirty days thereafter within which to take testimony in rebuttal, and the defendants having failed to take any testimony in support of their said answer and the parties having consented that the above entitled cause be set down for final hearing upon all the pleadings and files herein, it is now

Ordered that said cause be so set down for final hearing at the United States court room in the city of St. Paul on this the 16th day of January, 1905, at ten o'clock in the forenoon.

By the Court,
WM. LOCHREN, Judge.

Indorsed: Order setting the case for hearing. Filed January 16th, 1905. Henry D. Lang, Clerk.

That on the 24th day of January, A. D. 1905, there was filed with said Clerk the Opinion of Court directing entry of a Decree dismissing the Bill of Complaint and Supplemental Bill in said cause, in the words and figures following, to-wit:

United States Circuit Court,
District of Minnesota,

Fifth Division.

Northern Lumber Company, Complainant,
v.
72 William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

Mr. James B. Kerr for complainant.
Mr. J. N. Searles for defendants.

January 16, 1905.

Lochren, J., (Orally). On May 5th, 1864, congress enacted a statute granting to the Lake Superior & Mississippi Railroad Company certain lands in aid of the construction of a railroad from St. Paul to some point on Lake Superior, State of Minnesota; the grant being of the odd numbered sections within specified limits; reserving lands which had been disposed of or which were covered by pre-emption or homestead entry, or in any other manner appropriated or reserved; and providing for indemnity in lieu of any such lands from odd sections within certain other specified limits. On the 7th day of May, 1864, two days later, the Lake Superior & Mississippi Railroad Company filed a map of its general route in the Land Department, and thereupon, the Commissioner of the General Land Office issued an order withdrawing lands in odd sections from preemption or homestead entries, within the supposed limits of this grant; and this order included the lands in question. On July 2, 1864, the land grant to the Northern Pacific Railroad Company was enacted, and the lands in question also came within the place limits of the grant, to that road according to the line of definite location which was afterwards adopted by the Northern Pacific Company and filed with the Secretary of the Interior.

73 The only question in the case is, whether these lands, having been withdrawn by executive authority prior to the passage of the act granting the lands to the Northern Pacific Railroad Company, this took them out of that grant; as when the line of definite location of the Lake Superior & Mississippi Railroad was afterwards determined upon, adopted and filed, these lands did not come within the limits of lands granted to that company.

According to the usage of the Land Department for a long time, it had been customary to withdraw the lands along the lines of railroads which would come within the definition of lands which were granted to aid their construction, from public sales and from entry by homesteaders or preemptors, for the

purpose of reserving them for such grants; and that had been done in this case with reference to the supposed line of the Lake Superior & Mississippi Railroad, before the grant to the Northern Pacific Company.

The question is whether this reservation of them by executive authority excepted them or took them out of the subsequent grant to the Northern Pacific Railroad Company. It seems to me, that under the authority of the case of Wolcott v. The Des Moines Company, 5 Wall, 681, it did have that effect; although when the Lake Superior & Mississippi Railroad was afterwards built, the line had been changed so that the lands did not come within its grant, but fell entirely outside of it.

Under the authority of that case, at the time of the passage of the act making the grant to the Northern Pacific Railroad Company, the lands were by executive authority, in the supposed carrying out of the act of congress making the prior land grant, reserved and withdrawn, and did not then stand in the category which would be understood by the general term, public lands, but came within the exception of lands that had been reserved.

74 I am inclined to think that this conclusion is determinative of this case, and that a decree must be entered dismissing the bill.

Ordered accordingly.

January 16, 1905.

Indorsed: Decision. Filed January 24, 1905. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk.

That further on the 24th day of January, A. D. 1905, there was filed with said Clerk the Decree of the Court in said cause, in the words and figures following, to-wit:

United States Circuit Court, District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

This cause having come on to be heard upon the bill of complaint, answer of defendants O'Brien, Albert J. Lammers and George A. Lammers, the replication of complainant to such answer, the supplemental bill of complaint, the answer of said O'Brien, Albert J. Lammers and George A. Lammers thereto and the replication of complainant thereto, and the stipulation of facts on the part of said complainant and defendants

O'Brien, Albert J. Lammers and George A. Lammers; and the defendant Mary E. Coffin being in default for want of appearance, although having been duly served with the subpoena herein, and having been argued by counsel for the re-
75 spective parties who have so appeared as aforesaid.

Now, Therefore, on consideration thereof, it is hereby ordered, adjudged and determined, and the court doth hereby order, adjudge, and decree, as follows, viz:

That the complainant's said bill of complaint and supplemental complaint herein be and the same hereby is dismissed, with costs to the defendants William O'Brien, Albert J. Lammers and George A. Lammers, to be taxed.

WM. LOCHREN, Judge.

Indorsed: Decree. Filed Jany. 24, 1905. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk.

That on the 2nd day of February, A. D. 1905, there was filed with said Clerk the Petition on Appeal and allowance thereof, Assignment of Errors and Bond on Appeal; which said documents are, in words and figurs, as follows, to-wit:

Circuit Court of the United States, for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant and Appellant.

vs.

William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants and Appellants.

The above named complainant, Northern Lumber Company, conceiving itself aggrieved by the decree entered herein on the 24th day of January, 1905, does hereby appeal from said decree to the United States Circuit Court of Appeals for
76 the Eighth Circuit, and prays that this, its appeal, may be allowed; and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated, January 31, 1905.

JAMES B. KERR,
Solicitor for Appellant.

The foregoing appeal is allowed, February 1, 1905.

WM. LOCHREN, Judge.

Endorsed: Petition for Appeal. Filed February 2, 1905. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk. Circuit Court of the United States, for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant and Appellant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants and Appellees.

And now in the above entitled cause and at the time of filing its petition for appeal herein, comes the said appellant, by James B. Kerr, its solicitor, and says that in the record and proceedings in the above entitled matter it manifestly appears that the court erred in the following particulars, to wit:

First. In adjudging that the land described in the bill of complaint herein was not public land of the United
77 States on July 2, 1864, within the meaning of the act of congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific Coast by the northern route", approved July 2, 1864.

Second. In adjudging that the land described in the bill of complaint herein did not pass to the Northern Pacific Railroad Company under said act of congress approved July 2, 1864.

Third. In dismissing the bill of complaint.

Fourth: In dismissing the supplemental bill of complaint.

Wherefore, appellant prays that the decree of said Circuit Court of the United States for the District of Minnesota in the above entitled cause be reversed.

JAMES B. KERR,
Solicitor for Appellant.

Indorsed: Assignment of Errors. Filed February 2, 1905. Henry D. Lang, Clerk. By Thos. H. Pressnel, Deputy Clerk.

Circuit Court of the United States, for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant and Appellant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants and Appellees.

78 Know All Men By These Presents, That we, F. Weyerhaeuser and J. W. Lusk, are held and firmly bound unto the defendant above named in the sum of five hundred dollars

($500.00) to be paid to said defendants, for the payment of which [will] and truly to be made we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of January in the year of our Lord one thousand nine hundred and five.

Whereas, the above named complainant has prosecuted an appeal to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the decree rendered in the above entitled suit by the Circuit Court of the United States for the District of Minnesota, Fifth Division.

Now, Therefore, The condition of this obligation is such that, if the above named appellant shall prosecute said appeal to effect and answer all damages and costs if it fails to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full [force] and virtue.

Signed, Sealed and
Delivered in Presence of
P. Hendrickson. F. WEYERHAEUSER, [Seal]
J. W. Mahan. J. W. LUSK. [Seal]

United States of America.

District of Minnesota,
County of Ramsey—ss.

Be It Known, That on this 31 day of January, 1905, before me personally appeared F. Weyerhaeuser and J. W.
79 Lusk, to me known to be the persons described in and who executed the foregoing bond, and acknowledged the same to be their free act and deed.

[Notarial Seal,
Ramsey County, Minnesota] P. HENDRICKSON,
Notary Public,
Ramsey County, Minnesota.

United States of America.

District of Minnesota,
County of Ramsey—ss.

F. Weyerhaeuser and J. W. Lusk, the sureties named in and who executed the foregoing bond, being first duly sworn, doth each for himself depose and say that he is a resident and freeholder of the state of Minnesota and worth the amount of one thousand dollars above his debts and liabilities and exclusive of his property exempt from execution.

F. WEYERHAEUSER,
J. W. LUSK.

Subscribed and Sworn to before me this 31 day of January, A. D. 1905.

[Notarial Seal, Ramsey Co. Minn.]

P. HENDRICKSON,
Notary Public,
Ramsey County, Minnesota.

The foregoing bond is approved as to form and sufficiency this 1st day of February, 1905.

WM. LOCHREN.

Indorsed: Bond on Appeal. Filed February 2, 1905. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk.

United States of America—ss.

80 To William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals of the Eighth Circuit, at the City of St. Louis, sixty days from and after the date hereof, pursuant to an appeal taken out of and allowed by the Circuit Court of the United States for the District of Minnesota, Fifth Division, wherein the Northern Lumber Company is appellant and William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin are appellees, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and why speedy justice should not be done between the parties in that behalf.

Witness the Honorable William Lochren, Judge of the United States District Court, for the District of Minnesota, at St. Paul, in said district, this 1st day of February, A. D. 1905.

WM. LOCHREN,
United States District Judge, for the District of Minnesota.

81 Due service of this instrument and receipt of copy thereof admitted at Stillwater, Minn., this 2 day of February, 1905.

J. N. SEARLES,
Attorney for O'Brien, A. J. & Geo. A. Lammers, appellees.

Entered No. 703. Circuit Court of the U. S. for the Dist. of Minnesota, Fifth Division. Northern Lumber Company vs. William O'Brien, Albert J. Lammers, Geo. A. Lammers and Mary E. Coffin. Citation. Filed February 23d, 1905. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk. James B. Kerr, Solicitor for Appellant.

82 United States of America—ss.

To William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals of the Eighth Cir-

cuit, at the City of St. Louis, sixty days from and after the date hereof, pursuant to an appeal taken out of and allowed by the Circuit Court of the United States for the District of Minnesota, Fifth Division, wherein the Northern Lumber Company is appellant and William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin are appellees, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and why speedy justice should not be done between the parties in that behalf.

Witness the Honorable William Lochren, Judge of the United States District Court, for the District of Minnesota, at St. Paul, in said district, this 1st day of February, A. D. 1905.

WM. LOCHREN,
United States District Judge,
For the District of Minnesota.

Due service of a similar copy purporting to be a true copy of the original citation is hereby admitted at Boise, Idaho, this 14th day of Feb., 1905.

MARY E. COFFIN.

83 United States of America

Circuit Court of the United States, District of Minnesota, Fifth Division.

I, Henry D. Lang, Clerk of said Circuit Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing containing 79 pages numbered consecutively from 1 to 82 inclusive, is a true and complete transcript of the Record, Process, Pleadings, Orders, Evidence, Final Decree and all other proceedings in the cause entitled Northern Lumber Company, Complainant, vs. William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants; and I do further certify and return that I have annexed to said transcript and included within said paging the original Citation with proof of service thereof.

Seal
U. S.
Circuit Court
Fifth Division
Dist. of Minnesota.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Duluth, in the District of Minnesota, this 25th day of February, A. D. 1905.

HENRY D. LANG, Clerk.
By Thos. H. Pressnell, Deputy.

Filed Mar. 4, 1905. John D. Jordan, Clerk.

(*Appearance of Counsel for Appellant.*)

On the fourth day of March, A. D. 1905, an appearance of counsel for appellant was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2219.

NORTHERN LUMBER COMPANY, Appellant,
vs.
WILLIAM O'BRIEN ET AL.

The Clerk will enter my appearance as Counsel for the Appellant.
JAMES B. KERR.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2219. Northern Lumber Company, Appellant, *vs.* William O'Brien, *et al.* Appearance. Filed Mar. 4, 1905. John D. Jordan, Clerk. James B. Kerr, Counsel for Appellant.

(*Appearance of Counsel for Appellees.*)

And on the tenth day of March, A. D. 1905, an appearance of counsel for appellees was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE NORTHERN LUMBER COMPANY, Complainant & Appellant,
vs.
WILLIAM O'BRIEN, A. J. LAMMERS, GEORGE A. LAMMERS, and MARY E. COFFIN, Defendants & Respondents.

To the Clerk of said Court:

Please enter my appearance as Solicitor for the above named respondents, William O'Brien, A. J. Lammers and George A. Lammers.

Dated at Stillwater, Minn. this 8th day of March, 1905.

J. N. SEARLES,
Solicitor for Respondents.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. 2219. Northern Lumber Co., Appt., *v.* Wm. O'Brien *et als.*, Respt. J. N. Searles, Attorney for Respondents, 11 Mower Block, Stillwater, Minnesota. Filed Mar. 10, 1905. John D. Jordan, Clerk.

(*Order of Submission.*)

And on the fifth day of June, A. D. 1905, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1905.

No. 2219.

THE NORTHERN LUMBER COMPANY, Appellant,
vs.
WILLIAM O'BRIEN ET AL.

Appeal from the Circuit Court of the United States for the District of Minnesota.

MONDAY, *June* 5, 1905.

This cause having been called for hearing in its regular order, argument was commenced by Mr. James B. Kerr for appellant, continued by Mr. J. N. Searles for appellees and concluded by Mr. James B. Kerr for appellant.

Thereupon, this cause was submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twenty-sixth day of July, A. D. 1905, an opinion of said Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1905.

No. 2219.

NORTHERN LUMBER COMPANY, Appellant,

vs.

WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS, and MARY E. COFFIN, Appellees.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Mr. James B. Kerr, for appellant.
Mr. J. N. Searles, for appellees.

Before Van Devanter, Circuit Judge, and Carland and Pollock, District Judges.

Syllabus.

1. PUBLIC LAND—SETTLED MEANING OF TERM IN LEGISLATION OF CONGRESS.—The words "public land" have long had a settled meaning in the legislation of Congress and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made.
2. SAME — WITHDRAWAL FOR BENEFIT OF RAILROAD LAND GRANT.—Where a withdrawal of public lands along the route of a railroad, in aid of which a grant of lands has been made by Congress, is made by the chief officers of the land department, in advance of the definite location of the route of such road, in order that the lands may be preserved for the ultimate satisfaction of the grant, such withdrawal, if not made in opposition to the terms of the grant or other congressional enactment, is a reservation made by competent authority. The reservation removes the lands embraced therein from the category of public land and excludes them from subsequent railroad land grants containing no clear declaration of an intention to include them, even though it subsequently transpires that the withdrawal was ill-advised or that the lands are not required for the satisfaction of the grant.
3. SAME—GRANT TO NORTHERN PACIFIC RAILROAD COMPANY.—The grant to the Northern Pacific Railroad Company made by the act of July 2, 1864, 13 St. 365, was one *in præsenti* and was in terms confined to public land. Land not public at the date of the grant was not granted, even though it subsequently became of that character. Bardon *v.* Northern Pacific Railroad Co., 145 U. S. 535, followed; United States *v.* Oregon & California Railroad Co., 176 U. S. 28, distinguished.

Statement.

This is a suit in equity brought by the appellant to obtain a decree perpetually enjoining the appellees from cutting or removing the timber standing on part of an odd-numbered section of land in Northern Minnesota. The land is vacant and unoccupied, and the timber thereon gives it its principal value. The appellant claims full title, under the grant of public lands made to the Northern Pacific Railroad Company by the act of Congress of July 2, 1864, 13 St. 365. When the suit was brought the appellees were asserting a right to cut and remove the timber under a claim to the land initiated under the forest reserve lieu land provision in the act of Congress of June 4, 1897, 30 St. 11, 36. The claim under the grant to the railroad company had been presented to and rejected by the land department of the Government prior to the initiation of the claim under the act of June 4, 1897. 31 Land Decisions, 32. The latter claim was initiated prior to the bringing of the suit and, as shown by the supplemental bill and the answer thereto, was perfected into full title by the issuance of a patent thereon during the pendency of the suit. At the date of the grant to the Northern Pacific Railroad Company the land was withdrawn from pre-emption, settlement and sale in order that it might be ultimately available for the satisfaction of a prior grant of lands made by Congress May 5, 1864, 13 St. 64, in aid of the construction of a railroad from St. Paul, Minnesota, to the head of Lake Superior, which came to be known as the Lake Superior & Mississippi Railroad. This withdrawal was made by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, May 26, 1864, after the filing and acceptance of a map of the general route of the Lake Superior & Mississippi Railroad, which indicated that the land would fall within the place limits of the grant made in aid of that road. The land was public in the full sense of the term at the date of the grant of May 5, 1864, and at the date of the withdrawal. The route of the Lake Superior and Mississippi road as definitely located September 25, 1866, by the filing and acceptance of the required plat, departed so far from the line provisionally indicated upon the map of the general route that this land fell entirely without the limits of the grant. The prior withdrawal was then impliedly, if not expressly, revoked as to all lands falling without the limits of the grant as adjusted to the line of definite location. It was during the existence of the withdrawal for the benefit of the Lake Superior & Mississippi Railroad that the grant of public land was made to the Northern Pacific Railroad Company by the act of July 2, 1864, *supra*. This land is within the place limits of that grant and the portion of that company's railroad opposite thereto was definitely located July 6, 1882. At that time this land was public land, not mineral, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights. The Circuit Court held that land which at the date of the grant to the Northern Pacific Railroad Company was

included within a withdrawal like that made for the benefit of the Lake Superior and Mississippi Railroad did not come within the description of "public land" granted to the Northern Pacific Railroad Company and entered a decree dismissing the bill and supplemental bill. 134 Fed. 303.

The grant to the Northern Pacific Railroad Company is expressed in the third section of the act of July 2, 1864, *supra*, and reads as follows:

"SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further*, That the railroad company receiving the previous grant of land may assign their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided, further*, That all mineral lands shall be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: *And provided, further*, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said 'Northern Pacific Railroad.'"

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The grant to the Northern Pacific Railroad Company was one *in præsenti* and was in terms confined to "public land." St. Paul & Pacific R. R. Co. *v.* Northern Pacific R. R. Co., 139 U. S. 1, 5. Land not public at the date of the grant was not granted, even though it subsequently became of that character. Bardon *v.* Northern Pacific R. R. Co., 145 U. S. 535, 539; Northern Pacific Ry. Co. *v.* De Lacey, 174 U. S. 622, 626; United States *v.* Southern Pacific R. R. Co., 146 U. S. 570, 594, 606. The words "public land" have long had a settled meaning in the legislation of Congress and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is *reversed* by competent authority for any purpose or in any manner, although no exception of it is made. Bardon *v.* Northern Pacific R. R. Co., *supra;* Wilcox *v.* Jackson, 13 Pet. 498, 513; Leavenworth, etc., R. R. *v.* United States, 92 U. S. 733, 741, 745; Newhall *v.* Sanger, 92 U. S. 761; Doolan *v.* Carr, 125 U. S. 618, 630; Cameron *v.* United States, 148 U. S. 301, 309; Mann *v.* Tacoma Land Co., 153 U. S. 273, 284; Barker *v.* Harvey, 181 U. S. 481, 490; Scott *v.* Carew, 196 U. S. 100, 109. From the time of the earliest railroad land grants it was the practice of the chief officers of the land department, to whom was committed the administration of such grants, to withdraw from settlement, entry and sale the public lands along the line or route of the road so aided, in advance of its definite location, in order that the lands might be preserved for the ultimate satisfaction of the grant. Such withdrawals, where not made in opposition to the terms of the grant or other congressional enactment, have been uniformly declared to be reservations made by competent authority and to be efficient to remove the lands therein from the category of public land and to exclude them from subsequent railroad land grants, containing no clear declaration of an intention to include them, and this even though it subsequently transpired that the withdrawal was ill-advised or that the lands therein were not required for the satisfaction of the grant. Wolcott *v.* Des Moines Company, 5 Wall. 681, 688; Riley *v.* Welles, Book 19 L. Co. Op. ed. Sup. Ct. Reports, 648; Wolsey *v.* Chapman, 101 U. S. 755, 768; Wisconsin Central R. R. Co. *v.* Forsythe, 159 U. S. 46, 54, 55; Spencer *v.* McDougal, 159 U. S. 62; Northern Pacific R. R. Co. *v.* Musser-Sauntry Co., 168 U. S. 604, 607.

The application of these fixed rules of decision to the facts of the present case sustains the holding of the Circuit Court and requires that its decree be affirmed. At the date of the grant to the Northern Pacific Railroad Company the land now in controversy was embraced in a subsisting withdrawal made by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, for the purpose of preserving the land for the satisfaction of a prior grant in aid of the construction of another railroad, the provisional location of which, as shown upon the accepted map of its general route, indicated that the land would probably fall within

the place limits of that grant and would be required for its satisfaction The withdrawal was not made in opposition to the terms of the prior grant or of any other congressional enactment, and there is nothing in the subsequent grant to the Northern Pacific Railroad Company indicative of an intent on the part of Congress to use the words "public land" therein in a sense which would embrace lands at that time withdrawn or reserved for the protection of a prior grant. In short the subsequent grant, being *in præsenti* and confined to public land, did not embrace the land now in controversy because it was then excluded from the category of public land by reason of the subsisting withdrawal or reservation. It is true that after the date of the grant to the Northern Pacific Railroad Company and before the definite location of the line of that company's road the land was released from the withdrawal and thereupon became public in the fullest sense of the term, but this did not place it within the operation of a preceding grant *in præsenti* confined to land then public. The release simply restored it to the public domain and subjected it to future disposal under any law then applicable to it. The decision of the Supreme Court in Barlow v. Northern Pacific Railroad Co., *supra*, is conclusive on this point. The land there in controversy was part of an odd-numbered section, not mineral, within the place limits of the grant to the Northern Pacific Railroad Company made by the act of July 2, 1864, and to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of that company's road was definitely fixed, but it was not public land within the usual and settled meaning of that term at the date of the grant. It was then covered by a subsisting pre-emption entry theretofore wrongfully allowed without proof of the pre-emptor's compliance with the law. Shortly thereafter, and before the line of road was definitely fixed, the entry was canceled by the Commissioner of the General Land Office because of the absence of such proof and the money theretofore paid on the entry was refunded by the Government. There, as in the present case, it was contended that the status of the land at the date when the line of road was definitely fixed was the only criterion in determining whether or not it passed to the railroad company under the grant. In holding otherwise the court said (p. 538):

"It is thus seen that when the grant to the Northern Pacific Railroad Company was made, on the 2nd of July, 1864, the premises in controversy had been taken up on the pre-emption claim of Robinson, and that the pre-emption entry made was uncancelled; that by such pre-emption entry the land was not at the time a part of the public lands; and that no interest therein passed to that company. The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All land, to which any claims or rights of others have attached, does not fall within the designation of public land. The statute also says that whenever, prior to the definite location of the route of the road, and of course prior to the grant made, any of the lands which would

otherwise fall within it have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands are to be selected in lieu thereof under the direction of the Secretary of the Interior. There would therefore be no question that the pre-emption entry by the heirs of Robinson, the payment of the sums due to the government having been made, as the law allowed, by them after his death, took the land from the operation of the subsequent grant to the Northern Pacific Railroad Company, if the pre-emption entry had not been subsequently cancelled. But such cancellation had not been made when the act of Congress granting land to the Northern Pacific Railroad Company was passed; it was made more than a year afterwards. As the land pre-empted then stood on the records of the Land Department, it was severed from the mass of public lands, and the subsequent cancellation of the pre-emption entry did not restore it to the public domain so as to bring it under the operation of previous legislation, which applied at the time to land then public. The cancellation only brought it within the category of public land in reference to future legislation. This, as we think, has long been the settled doctrine of this court."

And referring to the case of Leavenworth, etc., R. R. Co. *v.* United States, *supra*, in which a claim to lands under a railroad land grant was rejected where the lands were within an Indian reservation at the date of the grant, but at the date of the definite location of the line of the road had become public land in the proper sense of the term by reason of the termination of the reservation, it was also said (p. 543):

"Three justices, of whom the writer of this opinion was one, dissented from the majority of the court in The Leavenworth Case; but the decision has been uniformly adhered to since its announcement, and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted, that, in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are at the time free from existing claims, is better and safer, both to the government and to private parties, than the rule which would pass the property subject to the liens and claims of others. The latter construction would open a wide field of litigation between the grantees and third parties."

Upon the filing and acceptance of the map showing the general route of its railroad the Lake Superior & Mississippi Railroad Company acquired an inchoate right to the odd-numbered sections public at the date of the grant of May 5, 1864, within the prescribed limits on each side of that route, and thereupon the land officers, anticipating that the line of definite location would substantially conform to the general route, withdrew these sections from pre-emption settlement and sale, thus placing them in a state of reservation for the benefit of that company and removing them from the category of public land. Such was the status of the land now in controversy when the grant was made to the Northern Pacific Railroad Company. Had the line of definite location of the Lake

Superior & Mississippi Railroad as subsequently established conformed to the line of its general route sufficiently to have brought the land within the place limits of the grant in aid of that road, there would be no question that the Lake Superior & Mississippi Railroad Company would thereupon have acquired a vested right to the land, as of the date of that grant, and that the same would not be within the operation of the grant to the Northern Pacific Railroad Company. Northern Pacific R. R. Co. *v.* Musser-Sauntry Co. 168 U. S. 604, 611; St. Paul & Pacific R. R. Co. *v.* Northern Pacific R. R. Co., 139 U. S. 1, 17; United States *v.* Southern Pacific R. R. Co., 146 U. S. 570, 595. As however the line of definite location of the Lake Superior & Mississippi Railroad departed materially from the general route no title to the land vested in the Lake Superior and Mississippi Railroad Company and the withdrawal or reservation was modified accordingly; but these matters, occurring subsequently to the grant to the Northern Pacific Railroad Company and therefore after the time in respect of which that grant must operate as one *in præsenti*, if at all, are without any bearing upon the decision of the present case unless, as before indicated, there is something in the granting act clearly indicative of an intent on the part of Congress to depart from the settled meaning of the words "public land" and to use them in a sense which would embrace lands then withdrawn and reserved for the satisfaction of a prior grant in aid of another railroad. Not only is there nothing in the act of July 2, 1864, indicative of such intent, but the clear import of the first proviso to section 3, *supra*, is that there was none. United States *v.* Southern Pacific R. R. Co., 146 U. S. 570, 605.

The reliance of counsel for the appellant seems to be on the cases of Northern Pacific R. R. Co. *v.* Sanders, 166 U. S. 620; Menotti *v.* Dillon, 167 U. S. 703; Nelson *v.* Northern Pacific Ry. Co., 188 U. S. 108; and United States *v.* Oregon & California R. R. Co., 176 U. S. 28. None of these cases has particular reference to or makes the decision turn upon the clause, "there be, and hereby is, granted * * * every alternate section of public land," which makes the grant one *in præsenti* of land then public, but instead each has particular reference to and makes the decision turn upon the limitation on the granting clause which makes it also requisite that "the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights at the time the line of said road is definitely fixed." They all recognize the well established rule, that the grantee under a railroad land grant acquires, by designating the general route of its road, only an inchoate right to the odd-numbered sections granted by Congress and that until the definite location of the road these sections remain within the disposing power of Congress, and this even though they be withdrawn for the protection of the grant as in the present case; but there is nothing in this which is inconsistent with the rule, equally well established, that an intent to supersede such a withdrawal and to make other disposition of the lands covered thereby is not deducible from subsequent legislation relating to "public land," unless it contains something to indicate that that

term is used otherwise than according to its settled meaning. This is made clear in Menotti *v.* Dillon, where it was said (p. 719):

"It is said that the railroad company filed its map of general route on the 8th day of December, 1864, and that these lands having been withdrawn from pre-emption, private entry and sale by the executive order of January 30, 1865, they were not embraced by the act of 1866. In our opinion this is not a proper interpretation of that act. The proviso of the first section distinctly indicates certain cases to which the act should not apply; and, distinctly excluding those cases, but no others, from its operation, the act, in express words, confirmed to the State, 'in all cases,' lands which the State had theretofore selected in satisfaction of any grant by Congress and sold to purchasers in good faith under its laws."

In this connection it may be properly observed that the same rule which defeats the appellant in the present case was applied in favor of its grantor, the Northern Pacific Railroad Company, as much as fourteen years ago, in St. Paul & Pacific R. R. Co. *v.* Northern Pacific R. R. Co., 139 U. S. 1, 17, where it was said:

"Besides, the withdrawal made by the Secretary of the Interior of lands within the forty mile limit, on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific Railroad from the operation of any subsequent grants to other companies not specifically declared to cover the premises."

The very earnest contention of learned counsel for the appellant that the question presented in this case is identical with that determined by the Supreme Court in United States *v.* Oregon & California R. R. Co., *supra*, justifies a somewhat extended statement respecting that case. Primarily the controversy arose out of a claimed conflict between the grant made to the Northern Pacific Railroad Company by the act of July 2, 1864, and the grant to the Oregon & California Railroad Company made by the act of July 25, 1866, 14 Stat. 239. March 6, 1865, Josiah Perham, President of the Northern Pacific Railroad Company, addressed to the Secretary of the Interior a communication transmitting to that officer a map said to designate the general route of the Northern Pacific Railroad and requested that it be filed in the office of the Commissioner of the General Land Office, and that an order of withdrawal be made of the lands along the route designated. The map was not accepted, because not sufficient as a map of general route, and no order of withdrawal was made thereon; nor was there ever any definite location or construction of the Northern Pacific Railroad opposite to the lands in suit. The road of the Oregon & California Company was definitely located and constructed, and the lands within the area of September 29, 1890, 26 Stat. 496, forfeited to the United States all lands theretofore granted to any corporation to aid in the construction of a railroad which were opposite to and co-terminous with the portion of such railroad not then completed and in operation. The purpose of the suit was to cancel the patents issued to the Oregon and California Railroad Company for the lands within the area claimed to be in conflict, the contention of the Government being

that the patents were issued without authority of law. It was stated in the opinion:

"This contention rests upon the assumption that the lands so patented—although within the limits of the grant contained in the act of July 25, 1866, and within the line of the Oregon Company as definitely located—were excluded from that grant because included in the grant previously made to the Northern Pacific Railroad Company by the act of July 2, 1864, * * * ; in which case, it is insisted that they were forfeited to the United States by the act of September 29, 1890, * * * and should be so adjudged."

The opinion does not disclose any contention on the part of the Government that the grant of July 25, 1866, being one *in praesenti* and confined to public land, did not include the lands in controversy because then withdrawn or reserved for the benefit of the prior grant. To the contrary it is said: "The contention of the government renders it necessary to ascertain what interest, if any, was acquired by the Northern Pacific Railroad Company in these lands by virtue of the act of July 2, 1864." Then, after stating that the grant made by that act was in the nature of a "float," no right or title to any particular section becoming "certain" until a definite location of the line of road, it was further said:

"If therefore the Perham map of 1865 were conceded for the purpose of the present discussion to have been sufficient as a map of 'general route'—and nothing more can possibly be claimed for it—these lands could not be regarded as having been brought by that map (even if it had been accepted) within the grant to the Northern Pacific Railroad Company, and thereby have become so segregated from the public domain as to preclude the possibility of their being earned by other railroad companies under statutes enacted by Congress after the filing of that map and before any definite location by the company of its line."

An extended reference to decided cases, particularly to Northern Pacific R. R. Co. *v.* Sanders and Menotti *v.* Dillon, *supra*, was then made, in the course of which it was declared that a general statement, in Buttz *v.* Northern Pacific R. R. Co., 119 U. S. 55, 72, to the effect that upon the designation of the general route of the Northern Pacific Railroad "the law withdraws" the odd-numbered sections within the prescribed limits for the protection of the grant, was too broad if intended to convey the thought that the designation of such route would prevent these sections from being granted by Congress to, and from being earned by, another railroad corporation prior to the definite location of the line of road. It was then said:

"As the grant contained in the act of July 2, 1864, did not include any lands that had been reserved, sold, granted or otherwise appropriated at the time the line of the Northern Pacific Railroad was 'definitely fixed;' as the route of the Northern Pacific Railroad had not been definitely fixed at the time the Company was definitely located; as the lands in dispute are within the limits of the grant contained in the act of 1866; as the route of the Oregon Railroad was definitely fixed, at least when the map showing that route was accepted by the Secretary of the Interior on the 29th day of Janu-

ary, 1870—the Northern Pacific Railroad Company having done nothing prior to the latter date except to file the Perham map of 1865; and as prior to the forfeiture act of September 29, 1890, there had not been any definite location of the Northern Pacific Railroad opposite the lands in dispute, there is no escape from the conclusion that these lands were lawfully earned by the Oregon Company and were rightly patented to it."

In a later case, United States *v.* Northern Pacific R. R. Co., 193 U. S. ..., 7, the question was presented as to what effect had been and should be given to the Perham map, and therefore as to what was decided in the former case, and it was said: "In United States *v.* Oregon & California R. R. Co., *supra*, it was held that if the Perham map were valid as a map of general route, it did not operate as a reservation." As no withdrawal was made by the officers of the land department along the route attempted to be designated by that map, and as the map did not of itself operate as a reservation, it follows that at the date of the grant of July 25, 1866, the lands in suit were not withdrawn or reserved for the benefit of the prior grant but remained within the category of public land. The case chiefly relied upon is therefore clearly distinguishable from the present one. The ultimate question decided in that case, as is indicated by the extracts before quoted from the opinion, was whether the grant of July 2, 1864, of itself excluded the lands in suit from the grant of July 25, 1866. Of course it did not. It did not identify them as within the limits of the grant, and, there being no definite location of the line of road opposite to them, they were never so identified.

The decree is affirmed.

Filed July 26, 1905.

(*Decree.*)

And on the twenty-sixth day of July, A. D. 1905, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1905.

No. 2219.

THE NORTHERN LUMBER COMPANY, Appellant,

vs.

WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS, and MARY E. COFFIN.

Appeal from the Circuit Court of the United States for the District of Minnesota.

WEDNESDAY, *July* 26, 1905.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin have and recover against the Northern Lumber Company the sum of twenty dollars for their costs herein and have execution therefor.

July 26, 1905.

(*Petition for and Order Allowing Appeal.*)

And on the twenty-first day of August, A. D. 1905, a petition for and order allowing an appeal was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN LUMBER COMPANY, Complainant and Appellant,
vs.
WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS, and MARY E. COFFIN, Defendant- and Appellees.

Now comes the Northern Lumber Company, a corporation, appellant in the above entitled cause and conceiving itself aggrieved by the decree affirming the decree of the Circuit Court made and entered in the above entitled cause on the 26th day of July, 1905, by the United States Circuit Court of Appeals for the eighth circuit, doth hereby appeal from said decree of the said United States Circuit Court of Appeals for the eighth circuit to the Supreme Court of the United States and this appellant prays that said appeal may be allowed and that a transcript of the record of proceedings herein, upon which said decree was made and entered, duly authenticated, may be presented to the Supreme Court of the United States.

JAMES B. KERR,
Solicitor for Complainant and Appellant.

And now, to-wit, this 19th day of August, 1905, it is ordered that the appeal prayed for by the above petition filed with the assignment of errors herein be and is hereby allowed.

WILLIS VAN DEVANTER,
Circuit Judge.

(Endorsed:) # 2219. U. S. Circuit Court of Appeals, 8th Circuit. Northern Lumber Co., *vs.* Wm. O'Brien, *et al.* Petition for Appeal and Order allowing Appeal. Filed Aug. 21, 1905. John D. Jordan, Clerk.

(*Assignment of Errors.*)

And on the twenty-first day of August, A. D. 1905, an assignment of errors was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN LUMBER COMPANY, Complainant and Appellant,
vs.
WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS, and MARY E. COFFIN, Defendant- and Appellees.

Assignment of Errors.

Comes now the above compla-nant and appellant, the Northern Lumber Company, and makes and files the following assignment of errors upon which it will *reply* upon its appeal from the decree of the court above named made and entered herein on the 26th day of July, 1905, as follows, towit:

I. The court erred in affirming the decree of the Circuit Court made and entered in this cause on the 24th day of January, 1905.

II. The court erred in not making and entering a decree in favor of the complainant and appellant, the Northern Lumber Company, and agains the defendants and appellees, William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, and not granting an injunction restraining said appellees from in any manner interfering with the property described in the original bill of complaint and the supplemental bill of complaint herein or taking timber therefrom without the consent of the appellant.

III. The court erred in not making and entering a decree that the complainant and appellant was the owner of the property described in the original bill of complaint and in the supplemental bill of complaint.

IV. The court erred in holding that the lands described in the bill of complaint and in the supplemental bill of complaint were not public lands on July 2, 1864, within the meaning of the act of congress entitled "An act granting land to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by he northern route," approved July 2, 1864.

V. The court erred n holding that the land described in the bill of complaint and in the supplemental bill of complaint did not pass to the Northern Pacific Railroad Company under and by virtue of said act of congress approved July 2, 1864.

VI. The court erred in holding that the withdrawal of the lands described in the bill of complaint and in the supplemental bill of complaint by the Commissioner of the General Land Office for the benefit of the grant made to the state of Minnesota entitled "An act making a grant of lands to the state of Minnesota to aid in

the construction of a railroad from St. Paul to Lake Superior," approved May 5, 1864, took the lands described in the bill of complaint and in the supplemental bill of complaint out of the category of public lands within the meaning of said act of congress approved July 2, 1864.

VII. The court erred in holding that the defendants and appellees were the owners of the land described in the bill of complaint and in the supplemental bill of complaint.

VIII. The court erred in holding that the complainant and appellant was not the owner of the lands described in the bill of comp-aint and in the supplemental bill of complaint.

IX. The court erred in dismissing the bill of complaint and the supplemental bill of complaint of complainant and the decree is erroneous in so ordering and adjudging.

Wherefore the complainant and appellant, the Northern Lumber Company, prays that said decree of the Circuit Court of Appeals of the United States for the eighth circuit be reversed with directions to render and enter a decree in favor of complainant and appellant and against defendants and appellees in accordance with the prayer for this appeal and the prayer of the bill of complaint and the supplemental bill of complaint in this case.

JAMES B. KERR,
Solicitor for Complainant and Appellant,
Northern Lumber Company.

(Endorsed:) # 2219. U. S. Circuit Court of Appeals, 8th Circuit. Northern Lumber Co., *vs.* Wm. O'Brien, *et al.* Assignment of Errors. Filed Aug. 21, 1905. John D. Jordan, Clerk.

(*Bond on Appeal.*)

And on the twenty-first day of August, A. D. 1905, a bond on appeal was filed in the Clerk's office of said Circuit Court of appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN LUMBER COMPANY, Complainant and Appellant,
vs.
WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS, and MARY E. COFFIN, Defendants and Appellees.

Know all men by these presents, That we, the Northern Lumber Company, a corporation, as principal and F. E. Weyerhaeuser and A. E. Macartney of the city of St. Paul, and state of Minnesota, as sureties, are held and firmly bound unto William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin in the full and just sum of five hundred dollars ($500.00) to be paid to said William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, their attorneys, executors, administrators or assigns,

to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 19th day of August in the year of our Lord one thousand nine hundred and five.

Whereas lately at a session of the Circuit Court of Appeals of the United States for the eighth circuit in the suit pending in said court between said Northern Lumber Company, complainant and appellant, and William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, defendants and appellees, a decree was rendered against the said Northern Lumber Company and the said Northern Lumber Company having obtained from said court an order allowing the appeal to the Supreme Court of the United States to reverse the decree so rendered in the aforesaid suit and a citation directed to the said William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin is about to be issued citing and admonishing them to be and appear at the United States Supreme Court at the city of Washington, District of Columbia:

Now therefore, the condition of the above obligation is such that if the said Northern Lumber Company shall prosecute its said appeal to effect and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then this obligation is to be void; otherwise to remain in full force and virtue.

NORTHERN LUMBER COMPANY,
By F. E. WEYERHAEUSER.
F. E. WEYERHAEUSER. [SEAL.]
A. E. MACARTNEY. [SEAL.]

STATE OF MINNESOTA, *County of Ramsey, ss:*

F. E. Weyerhaeuser and A. E. Macartney being first duly sworn, on oath each for himself deposes and says that he is a resident and freeholder of the district of Minnesota and that he is worth the sum mentioned in the above bond and obligation over and above all just debts and liabilities and exclusive of property exempt from execution and property situated in the district of Minnesota.

F. E. WEYERHAEUSER.
A. E. MACARTNEY.

Subscribed and sworn to before me this 19th day of August, 1905.

[SEAL.] WILLIAM T. GODDARD,
Notary Public, Ramsey County, Minnesota.

My commission expires April 5th, 1909.

The foregoing bond and sureties therein are hereby approved this 19th day of August, 1905.

WILLIS VAN DEVANTER,
Circuit Judge.

(Endorsed:) # 2219. United States Circuit Court of Appeals. Northern Lumber Co., Appellant, *vs.* William O'Brien, *et al.*, Appellees. Bond on Appeal. Filed Aug. 21, 1905. John D. Jordan, Clerk.

(*Citation.*)

And on the fourth day of September, A. D. 1905, a citation was filed in the Clerk's office of said Circuit Court of Appeals, the original of which with the admission and affidavit of service is hereto attached and herewith returned.

187.

Affidavit of Service.

STATE OF MINNESOTA, *County of St. Louis, ss:*

United States Circui Court of Appeals for the Eighth Circuit.

NORTHERN LUMBER COMPANY, Complainant & Appellant,
vs.
WILLIAM O'BRIEN ET AL.

STATE OF MINNESOTA, *County of St. Louis, ss:*

A. C. Gillette of the City of Duluth County of St. Louis in the State of Minnesota, being duly sworn, says, that at the City of Duluth in the County of St. Louis and State of Minnesota, on the 1st day of September 1905 he served the annexed Citation on Mary E. Coffin one of the Defendants in this action, by showing her the original and leaving with her personally a copy of said Citation. He further says that he knew the person served as aforesaid, to be the person mentioned and described in the said Citation as one of the Defendants therein.

A. C. GILLETTE.

Subscribed and sworn to before me, this 1st day of September 1905.

[NOTARIAL SEAL.] F. M. EMANUELSON,
Notary Public, St. Louis, Minn.

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN LUMBER COMPANY, Complainant and Appellant,
vs.
WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS, and MARY E. COFFIN, Defendants and Appellees.

UNITED STATES OF AMERICA, *ss:*

To William O'Brien, Albert J. Lammers, George A. Lammers, and Mary E. Coffin, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the City of Washington, in the District of Columbia, within thirty (30) days from

the date hereof, pursuant to an appeal duly taken and allowed from that certain decree of the United States Circuit Court of Appeals for the Eighth Circuit, wherein the Northern Lumber Company is complainant and appellant and you, William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, defendants and appellees, to show cause, if any there be, why the order and decree of affirmance in the said appeal mentioned should not be set aside and corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 19th day of August, 1905.

WILLIS VAN DEVANTER,
Circuit Judge.

[Endorsed:] U. S. Circuit Court of Appeals, 8th Circuit. Northern Lumber Company *vs.* Wm. O'Brien *et al.* Citation. Filed Sep. 4, 1905. John D. Jordan, Clerk.

Due service of this instrument and receipt of copy thereof admitted at Stillwater Minn. this 23d day of August 1905.

J. N. SEARLES,
Attorney for O'Brien et als., Defendants and Appellees.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing eighty-five pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said Circuit Court of Appeals, in a certain cause in said Court wherein The Northern Lumber Company was Appellant, and William O'Brien, *et al.*, were Appellees, No. 2219, May Term, 1905, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original citation, with an affidavit of service attached thereto and an admission of service endorsed thereon, is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Circuit Court of Appeals, at office in the City of St. Louis, Missouri, in the Eighth Circuit, this sixth day of September, A. D. 1905.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 19,915. U. S. circuit court of appeals, 8th circuit. Term No. 121. The Northern Lumber Company, appellant, *vs.* William O'Brien, Albert J. Lammers, George A. Lammers, and Mary E. Coffin. Filed September 29th, 1905. File No. 19,915.

FILE COPY.

Supreme Court of the United States.

Office Supreme Court, U. S.
FILED.
NOV 3 1906
JAMES H. McKENNEY,
CLERK

OCTOBER TERM, 1906.

No. 121.

THE NORTHERN LUMBER COMPANY,
Appellant,

vs.

WILLIAM O'BRIEN, ALBERT J LAMMERS, GEORGE A. LAMMERS AND MARY E. COFFIN.

APPELLANT'S BRIEF.

CHARLES W. BUNN,
JAMES B. KERR.

THE NORTHERN LUMBER COMPANY,
Appellant,

vs.

WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS AND MARY E. COFFIN.

STATEMENT.

This is an appeal from a decree of the Circuit Court of Appeals of the Eighth Circuit affirming a decree of the Circuit Court for Minnesota dismissing the appellant's bill of complaint. The bill alleges ownership in the appellant of the timber upon a parcel of land in Minnesota through mean conveyances from the receivers of the Northern Pacific Railroad Company, the corporation chartered by Congress in the act of July 2, 1864 (Transcript, p. 5).

The facts are stipulated (Transcript, pp. 23 to 34) and it appears from the stipulation:

By the act of July 2, 1864, Congress granted to the Northern Pacific Railroad Company:

> "Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad

ing by the grant) (Transcript, pp. 30 to 33), and has allowed a selection to be made by Mary E. Coffin under the forest reserve indemnity act of June 4, 1897 (Transcript, p. 33).

The lands are vacant and appellees, claiming under the said selection, intend to cut and remove the timber (Transcript, p. 34).

By supplemental bill and answer it appears that upon Nov. 16, 1903, after the bill was filed, a patent was issued to the Appellee Coffin.

Assignment of Errors.

1. The court erred in holding that the lands in controversy were not public lands of the United States on July 2, 1864, within the meaning of the act of Congress approved on that date granting lands to the Northern Pacific Railroad Company.

2. The court erred in dismissing appellant's bill of complaint.

Argument.

The simple question is, whether by the withdrawal upon general route in favor of the Lake Superior and Mississippi Company these lands ceased to be *public lands* within a grant of Congress made while the withdrawal was effective, which grant described *every* odd section of public land not reserved, granted, etc., *when the line de-*

scribed in the grant should be definitely located. The lands in suit were not reserved or granted and were free from claims when the line of the Northern Pacific was definitely located. But it is insisted that they were not *public lands* at the *date of the act of Congress;* and that they were taken out of that class of lands because then withdrawn from settlement in the interest of the Lake Superior and Mississippi Company.

The words "not reserved, granted or otherwise appropriated and free from pre-emption, or other claims or rights" in the Northern Pacific grant refer to the definite location *only.* Congress saw fit not to use these words when defining what lands should *at the date of the grant* come under its terms. Of those lands the only description in the act is "public lands" without more. Though the words "not reserved," etc., were *not* used in describing the lands covered at the date of the grant, and *were* used in describing those to be finally included at definite location, the decision below interpolates the words into that clause of the act from which Congress carefully omitted them.

The withdrawal upon general route for the Lake Superior and Mississippi Company having been set aside in September, 1866, the lands were free public lands when the Northern Pacific line was definitely located July 6, 1882; and they therefore fall literally within the Northern Pacific grant, unless their withdrawal was such as to forbid their inclusion on July 2, 1864, the date of the granting act, within the term "public lands" as used in that act.

(A) To a withdrawal precision and certainty are as necessary as to a conveyance. The particular lands withdrawn must be *certain* or *capable of being made certain*. The local officers have no authority to make withdrawals, which must rest for their validity upon an order of the Secretary or of the Commissioner of the General Land office. The withdrawal in this case of "a body of lands *about* twenty miles in width" was wholly indefinite and uncertain. It was not helped out by the map of general route transmitted with the withdrawal order to the local land office, because that map was wholly indefinite and uncertain, all of which is well pointed out in the Commissioner's letter of March 19, 1901 (Transcript, p. 28). We submit moreover that the same implication will be found in the Lake Superior and Mississippi grant invalidating any reservation before *definite location* which in *Hewitt v. Schultz*, 180 U. S. 139, was held to have that effect under the Northern Pacific grant. The two grants are not to be distinguished in this respect. The Lake Superior and Mississippi grant says (sec. 3): "And be it further enacted, *that when the said road shall be definitely located*, and a plat thereof filed with the Secretary of the Interior, the lands hereby granted shall not thereafter be subject to settlement, pre-emption or private entry adverse to this grant."

It is as clear by one act as the other (a) that no lands were to pass which prior to definite location had been otherwise appropriated or disposed of; (b) that the government's power of disposition was

not to be cut off by the mere passage of the granting act; (c) that the country was to remain open to settlement under the pre-emption and homestead laws until definite location.

(B) But conceding for argument's sake that the withdrawal was effective, we submit that it did not shield the lands from the operation of the subsequent grant to the Northern Pacific and did not deprive them of their character as public lands within the meaning of the Northern Pacific act.

The only requirement of the Northern Pacific grant relating to or defining the lands which *at its date* were embraced by the act of Congress being that they should be "public lands," the question is whether a reservation from pre-emption entry upon *general route* of another railway forbids their inclusion under that term.

There is a broad distinction between a reservation upon *general route* and one upon *definite location*, which latter sort of reservation the court considered in *Northern Pacific Railroad Company v. Musser-Sauntry Co.*, 168 U. S. 604. A reservation upon definite location is of indemnity land necessary (or supposed necessary) to fill losses in place limits. It is essential in order to save vested rights, not only as against entries under the land laws, but as against subsequent Congressional grants. The reservation upon general route involved in this case was, upon the contrary, not one

to protect or save rights. It was merely to facilitate the operations of the public land department. It covered only *place lands* and those needed no protection from subsequent disposal by Congress, the settled doctrine being that priority of grant gives priority of right. If they had been pre-empted the indemnity provisions of the act would have operated. The only effect and purpose of the withdrawal was therefore to save place lands from pre-emption so that it should not be necessary to select and adjust indemnity. Not only did no right attach to the lands by the withdrawal, but no claim was thereby asserted against them, and they were in no sense "appropriated" to the prior grant. See opinion in the *Musser-Sauntry* case, pp. 608-9. They did not cease thereby to be public lands within the disposal of Congress, and fairly included by an act conveying the public lands without reservation or exception.

The effect of withdrawal of public lands from pre-emption based upon *general location* of a railroad route has been repeatedly defined by this court. It is settled by the decisions, as we understand, that *such* a withdrawal does not segregate the land from the public domain so as to exempt it from later legislative grants. In other words, a so-called general route withdrawal is not withdrawal from or as against legislative control and disposition.

This was the point decided in *Northern Pacific Railroad Company v. Sanders*, 166 U. S. 620, involving a controversy over land which after with-

drawal as place land for the Northern Pacific grant upon general route, was filed upon as mineral land under an act of Congress of July 26, 1866, relative to the disposition of mineral lands. The mineral land act was later than the railroad grant and the filing under it later than the withdrawal under the railroad grant. The decision against the Railroad Company was squarely grounded by the court upon the principle that neither by location upon general route, nor by departmental withdrawal in pursuance of it, nor by anything short of definite location does a railroad company acquire such an interest even in its place lands as to prevent later granting acts of Congress attaching to them. The court said:

> "The company acquired, by fixing its general route, only an inchoate right to the odd-numbered sections granted by congress, and no right attached to any specific section until the road was definitely located and a map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the *public lands* on the general route of the road as it saw proper."

So in *Menotti v. Dillon*, 167 U. S. 703, under an act providing "that in all cases where the State of California has heretofore made selections of any portion of the *public domain* in part satisfaction of any grant made to said State, by any act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and hereby are, confirmed to said State," it was held that selections by the State of lands which

had been previously withdrawn, for the benefit of a railroad company which had filed its map of *general* route, were selections from the "*public domain*" within the meaning of the above quoted act, and passed as such to the State of California under the provisions of said act notwithstanding such withdrawal. The court said:

> "No exception is made of lands which, at the date of the passage of the act, were withdrawn from pre-emption, private entry and sale, pursuant to the filing by the railroad company of its map of *general* route, and the court should not construe the act as excluding lands in that condition, unless it is prepared to hold that Congress had no power to confirm to the State lands which, at the time, were simply withdrawn from pre-emption, private entry or sale for railroad purposes. We cannot so adjudge. The withdrawal order of January 30, 1865, did not, in our judgment, stand in the way of the passage of such an act as that of 1866; first, because the acts of 1862 and 1864 by necessary implication recognized the right of Congress to dispose of the odd-numbered sections, or any of them, within certain limits on each side of the road, at any time prior to the definite location of the line of the railroad; second, Congress reserved the power to alter, amend or repeal each act; third, the filing of the map of general route gave the railroad company no claim to any specific lands within the exterior limits of such route on either side of the road, the rule being that a grant of public lands, in aid of the construction of a railroad, is, until its route is established, in the nature of 'a float,' and title does not attach to specific sections until they are identified by an accepted map of definite location of the line of road to be constructed. The railroad company accepted the grant subject to the pos-

> sibility that Congress might, in its discretion, and prior to the definite location of its line, sell, reserve or dispose of enumerated sections for other purposes than those originally contemplated."

The same principle was involved in the recent cases of *United States v. Oregon & Cal. R. R. Co.*, 176 U. S. 28, and *Wilcox v. Eastern Oregon Co.*, 176 U. S. 51, which should be regarded as controlling and decisive of this appeal. The decision in *Nelson v. Northern Pacific Railway Co.*, 188 U. S. 108, that upon a correct construction of the Northern Pacific act there was no *legislative withdrawal* upon location of general route, does not detract from these decisions, for both the court in its opinion in the *Nelson* case and the dissenting justices in their opinion took occasion to reiterate the doctrine of the *Sanders*, *Menotti* and *Oregon Company* cases, that through nothing short of definite location will the rights of a railroad company so attach as to shield the land from the operation of a subsequent legislative grant.

So, in the earlier case of *Kansas Pacific R. R. Co. v. Atchison, etc., Co.*, 112 U. S. 414, it was held that lands passed to the Kansas Pacific Company under an act of July 2, 1864, although they had been withdrawn by order of the department in March, 1863, for the benefit of a grant to the Atchison Company, and as lying along its "*probable lines.*" The court said (p. 422):

> "The order of withdrawal of lands along the '*probable lines*' of the defendant's road, made on the 19th of March, 1863, by the Com-

> missioner of the General Land Office, affected no rights which without it would have been acquired to the lands, nor in any respect controlled the subsequent grant."

The cases in which withdrawals of land for the benefit of railroad companies have been held to exempt the land from the operation of subsequent legislative dispositions of public domain, are all instances of withdrawal upon definite location.

Thus, in *Northern Pacific Railroad Co. v. Musser-Sauntry Co.*, 168 U. S. 694, it is held that lands lying within the indemnity limits of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and withdrawn for its benefit by order of the department, in pursuance of a map of definite location of that road, were thereby so segregated from the public domain as not to pass under a subsequent grant to the Northern Pacific Company.

Of the three cases cited by the court in its opinion, as holding that such is the effect of a withdrawal as against subsequent railroad grants, the third, *Spencer v. McDougal*, 159 U. S. 62, involved only the question of the effect of a withdrawal as against a subsequent pre-emption entry, no subsequent legislative disposition being involved.

In the other two cases, *St. Paul & Pacific R. Co. v. Northern Pacific Railroad Co.*, 139 U. S. 1, and *Wisconsin Central Railroad Co. v. Forsythe*, 159 U. S. 46, the withdrawals, like that in the *Musser-Sauntry* case, were based upon definite locations. See 139 U. S. 17; 159 U. S. 49.

The same was true in *Lake Superior Co. v. Cun-*

ningham, 155 U. S. 354, 373, 375, where, as in the *Musser-Sauntry* case, definite location was emphasized as the basis of the decision.

There are to be found in the decisions of this court, a few general statements to the effect that only those lands are a part of the public domain within the meaning of railroad land grant acts, which are open to entry under the general land laws. Expressions of this kind, while not objectionable when read in connection with the particular circumstances inducing them, are misleading when severed from those connections. In every instance where such expressions occur, the withdrawal in question will be found to have been made for the protection of what *might prove to have become an actually vested right to the specific tracts withdrawn*. Between withdrawals of that character, and those which, without any assumption of a possibly vested right to the specific parcels withdrawn, are made merely as a matter of accommodation, in order that the rights of the party in whose interest the withdrawal is made, *may have opportunity to attach* to the withdrawn lands, the distinction is fundamental. The presumption is, that in its subsequent dispositions of the public domain, it is the intention of Congress to respect withdrawals of the former class, and to ignore those of the latter class. This unquestionably is the distinction which underlies and justifies the above mentioned and well established judicial discrimination between withdrawals on definite location, and those made upon maps of general route.

For upon the definite location of any railroad having a grant of place and indemnity lands, it becomes a matter of uncertainty whether all of the then available lands within the indemnity limits, may not be necessary to supply the deficiency of place lands. If such should ultimately prove to have been the fact, then in a very true sense, the railroad company may be said to have had, from the date of definite location a vested right to *all* of the public lands within the indemnity limits. *St. Paul & Pacific Railroad Co. v. Northern Pacific Railroad Co.*, 139 U. S. 1, 18-19.

But with respect to a withdrawal of place lands upon location of general route only, the situation is different. Such a location imposes no restraint upon the ultimate adoption of any route which might originally have been selected. The route may at the option of the company be so shifted as to affect few, if any, of the lands indicated by the general location. While it is true that it may turn out, upon definite location and construction, that some of the lands covered by a general route withdrawal, ultimately inure to the company, with the title relating back to the date of the grant, it is none the less true that the mere location of the general route cannot in any possible contingency operate to presently invest the company with an interest in the specific parcels of lands, which according to the indications of the general location, are likely to fall within the limits of the grant. A withdrawal of such lands is not for the protection of any interest which it is supposed may have al-

ready actually vested in the specific parcels withdrawn, but is a mere matter of gratuitous accommodation, in anticipation that the interests of the company may ultimately attach to such lands. It is therefore, not an appropriate or sufficient ground for impairing or intercepting the operation of later legislative grants.

In order to show how deeply rooted this distinction is in the law, and how consistently it has been applied in the cases, we add the following review of all the other decisions of this court bearing upon the extent to which lands are segregated from the public domain by either legislative or departmental withdrawals.

To the general doctrine that land to which there has attached either a vested private right or a permanent public use, is thereby segregated from the mass of lands held by the government for distribution through grants and entries, there is another which stands toward it somewhat in the relation of a corollary, to-wit: that where it is a matter of *doubt* whether as to a given tract of land, such a private right or public use has *actually attached*, it is appropriate that the land, the status of which is in doubt, should be withdrawn until the true status of the tract can be authoritatively determined. Within this class fall the cases of *Newhall v. Sanger*, 92 U. S. 761, 764-765; *Doolan v. Carr*, 125 U. S. 618, and *Cameron v. U. S.*, 148 U. S. 301, which determine only that the tenor of legislation was such as to evince an intention on the part of Congress to segregate from the public do-

main and from the operation of public land laws and grants, lands claimed under grants made by the Mexican government, until such claims had been adjudicated in the manner provided by Congress; and that as a consequence, lands so claimed under a Mexican grant and still *sub judice* at the date of an alleged grant or entry thereof, were not to be deemed at such date and under such circumstances open to disposition as a part of the public domain.*

To the same class belong such cases as *Kansas Pac. Ry. Co. v. Dunmeyer*, 113 U. S. 629; *Sioux City, etc., Co. v. Griffey*, 143 U. S. 32; *Hastings and Dakota R. R. Co. v. Whitney*, 132 U. S. 357; *Bardon v. N. P. R. R. Co.*, 145 U. S. 535, and *Whitney v. Taylor*, 158 U. S. 85, which merely apply the rules, that a railroad grant will not carry land upon which at the date of the railroad grant, a pre-emptioner appears by the public records to have acquired rights; and that inasmuch as a grant *in praesenti* should be construed as having reference only to lands over which the government has presently a power of disposition (146 U. S. 594), it will not carry lands appropriated at the date of the grant, even though they may afterwards fall back into the public domain. It is held not material whether the existing filing, claim or entry, is valid or invald; it being enough that its

United States v. McLaughlin, 127 U. S. 428, 454 to 456, contains an important qualification of *Newhall v. Sanger*, namely, that a reservation of a larger territory to satisfy a mere floating grant does not except the territory from the operation of subsequent Congressional grants so long as sufficient land is left to satisfy the float

validity is by the department either recognized or *sub judice*, since in such a case the government must keep itself in position to recognize and respect the right which is claimed to have become vested, if it should ultimately be found entitled to prevail.

The rationale of this rule in its relation to private rights undoubtedly is, as has been repeatedly declared by the courts, that sound public policy requires the government to deal directly, and unimpeded by extraneous influences, with persons claiming to have acquired vested rights in the public domain, and not to raise up an army of interlopers to come in between the government and the claimants of its lands.

In *Wolcott v. Des Moines Co.*, 5 Wall. 681, and *Williams v. Baker*, 17 Wall. 144, there had been granted to the State of Iowa, to aid in the improvement of the Des Moines river, the alternate sections in a strip five miles in width on either side of the river. The act was in terms of present grant with express provision that the lands should become the property of the state upon her admission into the Union, which was to occur in the immediate future (23 How. 84). A doubt having arisen as to whether the grant should extend along the full length of the river from the south to the north boundary of the state, or only as far north as the mouth of Raccoon Fork, the lands throughout the entire length of the grant as claimed by the state were, by departmental order, reserved

from sale, to abide the final determination of the controversy. It was held that the lands thus withdrawn were "reserved to the United States by competent authority" within the meaning of provisos contained in subsequent railroad land grants, and were therefore not affected by such grants. *It will be observed that in this case the claim of the state was that it had actually become the owner of these lands*, and the principle of the decision is that, where a withdrawal is made for the protection of an alleged vested right which, if valid, will be good against the world, the withdrawal is to be deemed a reservation from all forms of disposition, whether legislative or otherwise.

To the same effect substantially is the decision in *Wolsey v. Chapman*, 101 U. S. 755, in which the withdrawal or reservation of lands under the Des Moines river improvement grant was held to protect the withdrawn lands from selection under a prior floating grant to the state for purposes of internal improvement.

The case of *Wolcott v. Des Moines* and the other cases relating to the Des Moines river grant have, moreover, no bearing upon this case for another reason, viz.: the subsequent railroad grant involved in those cases contained the following proviso:

> "That any and all lands *heretofore* reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby

reserved to the United States from the operation of this act."

In the Northern Pacific grant there was, as above pointed out, no qualification whatever to the term "public land." The distinction here made applies also to the case of *Railroad Company v. United States*, 92 U. S. 733.

So far as pre-emption and homestead entries, etc., are concerned, there seems to be no limit to the power or discretion of the department to suspend the privilege of making such entries in any particular land district, or to withdraw lands from such entry. Hence, when an order of that kind is made, it is unnecessary to inquire whether made upon general location or definite location or merely in anticipation of the passage of a land grant act, or indeed whether there is any adequate reason for the withdrawal. The power of the department seems to be absolute and unqualified in the premises.

It was only as against such homestead or pre-emption entries that the withdrawals were held operative in *Bullard v. Des Moines R. R. Co.*, 122 U. S. 167, and *Hamblin v. Western Land Co.*, 147 U. S. 531, and *Spencer v. McDougal*, 159 U. S. 62.

Upon the whole, therefore, the following propositions appear to be well grounded in reason and in the decisions of this court:

(a) That a withdrawal either legislative or departmental, while operating to preclude private

entries may be inoperative as against subsequent legislative grants.

(b) That only those withdrawals are effective as against subsequent legislative grants which are made for the protection of possibly vested rights.

(c) That the last mentioned class of withdrawals includes those made upon definite location, but does not include those made upon general route.

CHARLES W. BUNN,
JAMES B. KERR.

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1906.

NO. 121.

Office Supreme Court, U. S.
FILED.
NOV 9 1906
JAMES H. McKENNEY,
CLERK.

NORTHERN LUMBER COMPANY, A CORPORATION,

Appellant,

v.

WM. O'BRIEN, ALBERT J. LAMMERS AND OTHERS,

Appellees.

BRIEF OF O'BRIEN ET ALS., *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CURCUIT

J. N. SEARLES,
Solicitor for Appellees.

SUPREME COURT
OF THE UNITED STATES

NORTHERN LUMBER COMPANY, A CORPORATION,
Appellant,

vs.

WM. O'BRIEN, ALBERT J. LAMMERS et als.,
Appellees.

BRIEF OF O'BRIEN, et als., *Appellees.*

Taking up the history of the title to the property involved in this cause, chronologically, it is as follows:

1864, *May 5th.* Congress granted lands to the State of Minnesota for the purpose of aiding in the construction of a railroad in said state from the city of St. Paul to the head of Lake Superior, the land being described as

> "Every alternate section of *public* land of the United States, not mineral, designated by odd section, to the amount of five alternate sections per mile on each side of said railroad on the line thereof, within the State of Minnesota, but in case it shall appear that the United States have, when the line or

> route of said road is definitely fixed, sold, apportioned, *reserved,* or otherwise disposed of any sections, or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same," then the Secretary of the Interior was required to select indemnity lands in lieu of those thus lost.

1864, *May* 7. The Lake Superior & Miss. R. Co. filed its map of general location, under this grant, requesting the government to withdraw for the benefit of the grant a strip of land sufficient to satisfy the grant. See map and certificate of James Smith, attorney, endorsed thereon; Exhibit "A" attached to stipulation of facts—p. 36, Transcript of Record.

The land in question lies within ten miles of the line of road as laid down on this map of general location, or within the place limits of the grant.

1864, *May* 26. The commissioner forwarded to the register and receiver of the land office at Duluth, Minn., a letter of instruction in which he says:

> "The Secreary of the Interior having approved of a withdrawal of lands for said road, you will suspend from pre-emption settlement and sale a body of lands about twenty miles in width, as indicated on the endorsed diagram 'A,' marked 'Lake Superior and Mississippi Railroad.'"

This diagram is the same as the map of general location, except it shows colored bands, or strips on both sides the line of road as indicated by the general location map. See stipulation p. 26-27, and 35, Transcript of Record.

1864, *July* 2. Congress granted lands to the Nor. Pac. R. Co. in words as follows:

> "There is hereby granted, etc., every alternate section of *public* lands, not mineral, designated by odd numbers, to the amount of.....ten alternate sections per mile on each side of said railroad, whenever it passes through any state, and whenever, on the line thereof, the United States have full title,

not reserved, sold, granted, or *otherwise appropriated,* and free from pre-emption, or other claim or right, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected" as indemnity lands, etc.

1866, *Sept.* 25. The L. S. & M. R. Co. filed its map of definite location, whereby this land was left outside the place limits of its grant.

1882, *July* 6. The Nor. Pac. R. Co. filed its location map and thereafter filed its map of definite location showing its grant of lands in place to include this land, *if this land was "public land and a portion of the mass of public land" at the time of the grant to it, July 2, 1864, out of which such grant could be satisfied.*

Since the commencement of this action, the land in controversy has been patented by the United States to Mary E. Coffin on her selection of said lands in lieu of lands relinquished to the United States within a certain forest reservation. This appears from the allegation of the supplemental bill, Folio 59, p. 48, Transcript Folio 63, id., p. 51, Transcript; Answer Fol. 66, p. 53; Transcript.

ON THIS STATEMENT OF FACT

complainant contends that this land fell within the grant to the Nor. Pac. R. Co., on the theory that

1. The withdrawal proceedings existing at the time of the Nor. Pac. R. Co. grant, were—in the language of the complaint—

"So vague, uncertain, indefinite and inaccurate that it is impossible for your orator to ascertain or determine whether or not the land hereinbefore described fell within the place or indemnity limits, as shown on said map or diagram; and that the language of the attempted order of withdrawl as contained in said letter of May 26, 1864, is so vague, uncertain and indefinite that your orator cannot determine whether or not it was thereby intended to include within such attempted withdrawal the land hereinbefore described. And your orator shows that said attempted withdrawal of land by such commissioner of the general land office was wrongful and without authority of law."

Bill of Complaint, Par. VIII.

2. If otherwise, then the subsequent grant to the Nor. Pac. R. Co. operated to override this withdrawal and bring this under the Nor. Pac. R. Co. grant, as "public land."

FIRST.

Was the withdrawal proceeding sufficient to take this land out of the class of "public lands" mentioned in the Nor. Pac. grant?

This question is raised by the Bill of Complaint but the point was not pressed in the Circuit Court or in the Circuit Court of Appeals, and we do not suppose this Court will be called upon to consider it. As a matter of prudence, however, we here state our view of the question.

The *line* of the proposed road was definitely laid down on the map filed by the L. S. & M. R. Co.

The word "about" used by the Commissioner in his withdrawal letter addressed to the Register and Receiver at Duluth, does not render his direction indefinite or uncertain.

See Letter, Bill of Complaint, Par. VIII. Record p. 26.

The rule is, that when the context limits and restrains the meaning of the word "about" its use does not materially impair the certainty of a description.

Adams v. Harrington, 114 *Ind.* 66.
Corey v. Swagger, 74 *Ind.* 211.
Jones v. Plummer, 2 *Lott.* 161.
Purinton v. Sedgley, 4 *Me.* 283-6.
Stevens v. McKnight, 40 *Ohio, St.* 341.
Balt. Land Soc. v. Smith, 54 *Md.* 204.
Sanders v. Morrison, 2 *T. B. Mon.* 109.
Shipp v. Miller, 2 *Wheat* 316.
Cutts v. King, 5 *Me.* 482.
Bodley v. Taylor, 5 *Cranch*, 224.
Johnson v. Panel, 2 *Wheat*, 206.

The *context* to which we are at liberty to refer in aid of this description is the grant which specified a width of ten miles each side of the road—or a total width of twenty miles.

The Commissioner could withdraw twenty miles—or ten miles on each side of the road.

Indeed the Commissioner could withdraw, as we shall hereafter see, any amount in his discretion.

In *Bodley v. Taylor, ante*, the expression "about seven miles" from a given place for the commencement of a boundary was held to be seven miles.

In *Johnson v. Pannel's Heirs*, 2 Wheat. 206, it was held, that "in ascertaining a place to be found by its distance from another place, the vague words 'about' or 'nearly' and the like, are to be rejected if there are no words rendering it necessary to retain them, and the distance is to be taken positively."

Whatever acts the department considered as a withdrawal operated as such, for no others can complain.

As late as Nov. 2, 1866, the department recognized this withdrawal proceeding as valid. See letter of Commissioner transmit-

ting diagram showing permanent or definite location of L. S. & M. road, dated Nov. 2, 1866. *Stipulation Par. IX. Record p. 27.*

Also letter of Secretary to Commissioner, dated March 19, 1901. *Stipulation Par. X. Record p. 29.*

The diagram prepared by the department to show limits of withdrawal on general route for the L. S. & M. R. Co. by letter of May 26, 1864, on map of same filed May 7, 1864, shows this land to be within *three miles* of the road, as located on general route. *Stipulation Ex. "A." Record p. 37.*

The decision of the Secretary of the Interior quoted in the bill of complaint herein, dated July 16, 1901 (*Record p. 31*), shows that the Department still considers the withdrawal sufficient, and the Nor. Pac. Ry. Co. submitted its claim to this land on grounds that assumed these lands to have been withdrawn by the Commissioner's letter of May 26, 1864, as appears from the following quotation from the same, Folio 40 Transcript.

> The appeal filed on behalf of the railway company is based upon the ground that the *withdrawal of May 26*, 1864, being a withdrawal upon map of probable or general route, did not prevent congress from granting the lands so withdrawn in aid of the Nor. Pac. R. Co. and that they were included in the grant to that company made by the act of July 2, 1864 because falling without the limits of the grant made by the act of May 5, 1864, as established by the definite location of the L. S. & M. railroad, no right ever attached to them under the earlier grant."

The Secretary of the Interior had authority to withdraw these lands from sale, pre-emption or other disposition, without express authority from congress or the president.

Wood v. Beach, 156 U. S. 548.
Spencer v. McDougal, 159 U. S. 62.
Merrill v. Chi., Etc., Ry. Co., 70 *Fed.* 464.

Kan., Pac. Ry. Co., v. Atchison Etc. Co., 13 *Fed.* 106.
Walcott v. Des Moines Co., 5 Wall. 681.

A withdrawal of public lands from sale by competent authority for the purpose of appropriating them to any lawful purpose operates to sever them from the public domain.

Wilcox v. Jackson, 13 Pet. 498.
Leavenworth Etc. v. U. S., 92 U. S. 745.
R. R. Co. v. Freeman Co., 9 Wall. 94.

The Department has ruled that this withdrawal affects unsurveyed as well as surveyed lands. 11 *L. O. Dec.* 186.

An interesting digest of decisions in the Land Department and the Supreme Court on the power of the Land Department to withdraw lands in aid of a grant, in anticipation of its definite location, is found in the dissenting opinion of Brewer, J., in the recent case of

Nelson v. Nor. Pac. R. Co., decided Jan. 26, 1903.

While the majority of the court in this Nelson case differed from the dissenting judges, Brewer, Brown and Shiras, there is nothing in the opinion of the court indicating that they differed with the dissenting judges on the question of power of withdrawal, *where it is not restrained by special limitations such as they found in the Nor. Pac. Ry. Co. charter.*

The court found special restrictions in that charter, limiting this power of withdrawal, while the dissenting judges could not agree with the court in that view.

SECOND.

Did the Nor. Pac. granting act override the departmental with-

drawal, and thus include the land in question among the "public lands" referred to in that act?

The decision of the department on the application of the Northern Pac. R. Co. for patent for this land, which is set out in the Bill of Complaint—Par. X.—indicates that complaint then relied as it still relies upon

U. S. v. Oregon, Etc., R. Co., 176 U. S. 128.

The decision and facts involved in this case are as follows—to state them chronologically.

1864, *July 2.* Congress made its grant to the Nor. Pac. Ry. Co. in the following words, to-wit:

> "Every alternate section of land, not mineral, designated by odd number, etc., whenever, on the line thereof the U. S. have full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claim or rights, at the time the line of said road is definitely fixed and a plat thereof filed, etc."

Sec. 6 required a survey of 40 miles in width after

> "general route shall be fixed and as fast as may be required by the construction of the railway, and the odd numbered sections hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company."

1865, *Mar.* 6. Mr. Perham, president of the Nor. Pac. Ry. Co., filed a map which the court, for argument's sake, treated as a map of general location and *requested a withdrawal of lands.*

For reasons stated in the letters of the Commissioner (and referred to in the opinion) *no lands were ever withdrawn* in aid of the N. P. R. Co. grant along the line included in that suit, nor did the company ever construct its road along or opposite to the lands there in question.

The opinion says:

"There never was any withdrawal of the indemnity lands on the proposed line between Wallula and Portland, nor any *definite location or construction* of the road—opposite to the lands in suit." *Op. p.* 42.

1866, *July* 25. Congress granted to the defendants—Oregon and California companies—"public lands, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile," etc.

If any land so described was found to have been "granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of"

other lands were to be selected, etc., under direction of the Secretary of the Interior.

It was made the duty of the secretary as soon as the companies, or either of them filed in his office a map of the survey or any portion not less than 60 continuous miles, to withdraw from sale the lands granted on either side of the road as far as located and within limits specified.

1869, *Oct.* 29. The Oregon Cent. Co. filed its map of "definite location" opposite the lands in controversy.

1870, *Feb.* 29. The foregoing map was accepted by the Secretary.

1870, *Feb.* The lands in question were withdrawn by the Secretary and afterwards the road was built in time to save the grant from forfeiture.

1870, *May* 31. Congress by the act of that date, granted the Nor. Pac. R. Co. the right to construct its main line to Puget Sound, via the Columbia River, with a grant for this new location the same as for the original road and in the same terms.

1870, *Aug.* 4. Nor. Pac. R. Co. filed map of general route along the Columbia River and the Secretary withdrew lands opposite that line, including the lands in controversy.

1890, *Sept.* 29. Congress forfeited all interest of the Nor. Pac. R. Co. in these lands by reason of non-construction of that part of its road. *26 Stats. at Large,* 496, *Chap.* 1040.

The lands had been patented to the Oregon Company, the government brought the suit to cancel the patents, claiming they had been issued by mistake, on the theory that

> "the land so patented—although within the limits of the grant contained in the Grant of July 25, 1866, and within the line of the Oregon Company as definitely located—were excluded from that grant, because included in the grant previously made to the Nor. Pac. R. Co. by act of July 2, 1864; in which case it was insisted they became forfeited to the U. S. by the act of Sept. 29, 1890." *Op.* 35.

On this state of facts the court said

> "The contention of the Government renders it necessary to ascertain what interest, if any, was acquired by the Nor. Pac. R. Co. in these lands by virtue of the Act of July 2, 1864." *Op.* 36.

The opinion reached the following conclusions, viz:

1. The grant to the Nor. Pac. R. Co. of July 2, 1864, was a "float" which conferred no right or title to any particular section until definite location of the route.

Many previous decisions to this effect are cited, among others Butts v. Nor. Pac. R. Co. 119 U. S. 55, U. S. v. Nor. Pac. R. Co. 152 U. S. 284 and Nor. Pac. R. Co. v. Sanders 166, U. S. 620.

The opinion says,

> "Until such definite location it was competent for Congress to dispose of the public lands on the genral route of the road as it saw proper." *Op.* 44.

2. If "the Perham map" were regarded as a sufficient map of the general route of the Nor. Pac. R. Co.—nothing stood in the

way of Congress granting to another railroad company any lands within the exterior lines of that route, by a statute passed after such map was filed in the Land Department and before a definite location of the Nor. Pac. railroad.

3. The grant to the Oregon Co. was such an act, and followed as it was by *definite location of the road* before the Nor. Pac. R. Co. filed map of definite location (and while the land had not been withdrawn from sale, etc.,) the Oregon Co. became entitled to the land.

What woud have been the situation *if the land had been withdrawn by executive order* the court does not say, and has no occasion to say.

The court refers to Menotti v. Dillon, 167 U. S. 703, and other cases to support its conclusion that Congress had power to grant to the Oregon Co. land embraced within the exterior limits of the general route as defined by the Perham map, but they were speaking of a case where there was no withdrawal order affecting the land, so as to take it out of the class of *public* lands.

In the *Menotti* case it was held that the subsequent grant included the lands there in controversy, nothwithstanding the filing of the map of general location of the road and a withdrawal by the executive department.

But this decision was because the language of the subsequent grant was so worded as to lead to the conclusion that *Congress, intended to override the executive withdrawal,* as of course, it could do, for there having been no definite location of road under the first grant, the right of the government to sell, reserve, etc., the lands had not terminated.

In the Menotti case, the subsequent grant was to the State of California in the following words,—

"In all cases where the State of California has heretofore made selections of any portion of the public domain, etc.—the lands so selected shall be and hereby are confirmed to said state: Provided, that no selection made by said state contrary to existing laws shall be confirmed by this act for lands to which any adverse pre-emption, homestead, or other right has at the date of the passage of this act, been acquired by any settler under the laws of the United States, or to *any lands which have been reserved for naval, military or Indian purposes by the United States,*" etc.

This proviso does not exempt from this grant to California *lands withdrawn for benefit of previous railroad grant;* and for this reason the court held that the lands in question were not excepted from this grant to California by the mere fact of a general location map under a prior grant or it vested no interest in the prior grantee, nor by reason of an executive withdrawal, because congress could, and in this case intended to, disregard the executive withdrawal proceedings.

That this decision did not involve a determination of the effect of a withdrawal order, appears from the following extracts from the opinion, to-wit:

"The Government, however, has insisted in its bill that the issuing of the patents to the Oregon & California Railroad Co. was without authority of law. This contention rests upon the assumption that the lands so patented—although within the limits of the grant contained in the Act of July 25, 1866, and within the line that the Oregon Company had definitely located—were excluded from that grant because included in the grant previously made to the Northern Pacific Railroad Co. by the Act of July 2nd, 1864, See c. 217, 13 State, 365; in which case, it is insisted that they were forfeited to the United States by the Act of Sept. 29, 1890, c. 1040, 26 Stat, 496, and should be so adjudged." *Op. p.* 34 *and* 35.

* * * * * * * * *

"If therefore, the Perham Act of 1865 were conceded for the purposes of present discussion to have been sufficient as

a map of 'General Route'—and nothing more can possibly be claimed for it—these lands could not be regarded as having been brought by that map (Even if it had been accepted) within the grant to the Northern Pacific Railroad Co., and thereby had become so segregated from the public domain as to preclude the possibility of their being earned by other railroad companies under the statutes enacted by Congress after the filing of that map, and before any definite location by the company of its line." *Op. p.* 43 *and* 44.

* * * * * * * * *

"We take it then to be undisputable that even if the Perham map of 1865 were regarded as a sufficient map of the 'general route' of the Northern Pacific Railroad, and not, to use the language of Judge Ross in this case, a mere sketch or diagram unauthenticated by an engineer or officer charged with the duty of designating such a route, nothing stood in the way of Congress granting to another railroad company any lands within the exterior lines of that route, by a statute passed after such a map was filed in the Land Department and before a definite location of the Northern Pacific railroad. Such a statute was that of July 25th, 1866, granting lands to aid in the construction of a railroad from the Central Pacific Railroad in California to Portland, Oregon. That the lands here in dispute—even if within the general route of the Northern Pacific Railroad as defined by the Perham map of 1865—are within the exterior limits of the grant to the Oregon Company contained in the subsequent Act of 1866, is expressly averred in the bill filed by the United States."

WE HAVE, THEN, IN THIS OREGON CASE, A DECISION THAT WOULD GIVE THE LAND IN CONTROVERSY TO THE NOR. PAC. R. CO., IF THE WITHDRAWAL FOR THE BENEFIT OF THE L. S. & M. R. CO. HAD NOT TAKEN THIS LAND OUT OF THE CLASS OF *PUBLIC* LAND, OR IF THE N. P. R. CO. GRANT HAD BEEN WORDED AS IN THE MENOTTI CASE SO AS TO SHOW THE INTENT OF CONGRESS TO DISREGARD THE WITHDRAWAL.

NELSON V. NOR. PAC. R. CO. 188 U. S. 108.

Since this cause was commenced the Supreme Court has rendered a decision in the foregoing entitled action which merits consideration.

The short facts in this action were as follows:

July 2, 1864, Congress passed the Nor. Pac. R. Co. grant.

Aug. 20, 1873, the map of general route was filed.

Nov. 1, 1873, the Commissioner withdrew "from *sale* or *entry*" the land in question, which was within 40 miles of the route as designated on the map.

In 1881 Nelson occupied this land under the homestead laws and continuously thereafter resided upon it.

Dec. 6, 1884, the railroad company *definitely* located its line, and the land in question lies within 40 miles of this definite location, and coterminous therewith.

In 1893 the land was surveyed.

As soon as surveyed Nelson attempted to enter it as a homestead, but his application was rejected, because in the opinion of the register and receiver it conflicted with the grant to the Nor. Pac. R. Co.

May 10, 1895, patent issued to the Nor. Pac. R. Co.

Nelson continuing in possession, the railroad company brought this action to recover possession, claiming ownership, which the defendant denied.

The opinion of the majority of the court determined the action in favor of Nelson on the following argument:

The Court say:

"When that (No. Pac.) grant was made, substantially the entire country between those points (its termini) was untravelled as well as uninhabited except by Indians, very few of whom, at that time, were friendly to the United States. The principal object of the grant, as will appear from its language, was to secure the safe and speedy transmission of the mails, troops, munition of war, and public stores, by means of a railroad and telegraph line, and to that end and in order to bring the public lands into market, it was deemed important to *encourage the settlement of the country* along the proposed route.

"The public lands in that vast region were unsurveyed, and it was not known when they would be surveyed. Congress, of course, knew that if immigrants accepted the invitation of the government to establish homes upon the unsurveyed public lands they would do so in the belief that the lands would be surveyed, that their occupancy would be respected, and that they would be given an opportunity to perfect their titles in accordance with the homestead laws.

"Such was the situation when the act of July 2, 1864, was passed. Necessarily the act must be interpreted in the light of that situation. It should not be interpreted so as to justify the charge that the government laid a trap for the honest immigrants who risked the dangers of a wild, unexplored country, in order that they might establish homes for themselves and their families.

"And it should not be supposed that Congress had in view only the interests of the company, which, with the aid of a munificent grant of lands, was empowered to connect Lake Superior and Puget Sound with a railroad and telegraph line."

Having thus stated the situation and object of Congress the Court proceed to an examination of the grant.

Sec. 3 is given in full, with certain words italicised, showing the stress laid upon them—

"That there be and hereby is granted, etc., for the purpose, etc., every alternate section of public land, not mineral, designated by odd numbers, to the amount, etc., whenever it passes through any state, *and* whenever on the line thereof the United States have full title not reserved, sold, granted, or otherwise appropriated *and free* from pre-emption, or *other claims or rights* at the time the line of said road *is definitely located,* and a plat thereof filed, etc., and whenever, *prior to said time* (of definite location) any of said sections or parts of sections shall have been granted, sold, reserved, *occupied by homestead settlers,* or pre-empted or otherwise disposed of, *other lands* shall be selected by said company *in lieu thereof,* etc."

"Sec. 6. That the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road, after the general route

shall be established, and as fast as may be required by the construction of said road; and the odd sections of land thereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act." (The further provisions extending the pre-emption and homestead laws to the even sections at double price are also quoted.)

The Court say:

By this 6th section it was declared that the odd sections 'hereby granted,' that is by this act granted, should not be liable to sale, entry or pre-emption before or after they were surveyed except by the company as provided in the act.

"But we have seen, looking at section 3, which was the granting section of the act, that Congress did not *grant* every odd numbered alternate section within the general limits specified, but *only* the odd numbered alternate sections to which the United States had full title and which had *not* been previously reserved, sold, granted or otherwise appropriated, *and* which were *free* from pre-emption' or other claims or 'rights' *at the time* the line of the road was *definitely* fixed—giving to the railroad company the right to select lands, within certain limits, in place of such as were found, *at the date of definite location,* to have been disposed of or to be *occupied by homestead settlers."*

"The first inquiry is whether the railroad company acquired any *vested* interest in the land in dispute by reason merely of the acceptance by the Land Department of its map of *general* route, or (2) by reason merely of the withdrawal order of 1873."

The Court determines that no such vested right existed, citing previous decisions, viz:

St. Paul & P. R. Co. v. Nor. P. R. Co., 139 *U. S.* 1.

United States v. Nor. Pac. R. Co., 152 *U. S.* 284.

Nor. Pac. R. Co. v. Sanders, 166 *U. S.* 620.

Menotti v. Dillion, 167 *U. S.* 703.

United States v. Oregon Etc., 176 *U. S.* 28.

Wilcox v. Eastern Or. L. Co. 176 *U. S.* 51.

Messinger v. Eastern Or. L. Co., 176 *U. S.* 58.

The Court say:

"The cases above cited definitely determine that the railroad company acquired no vested interest in any particular section of land until after a definite location as shown by an accepted map; and that until definite location the land covered by the map of general route was a 'float,' that is at large."

After referring to *Buttz v. Nor. Pac. R. Co.* 119 *U. S.* 55, *and* explaining that there is nothing in that case inconsistent with their present view, the court continue:

"It results that the railroad company did not acquire any vested interest in the land here in dispute in virtue of its map of general location, or the withdrawal order based thereon; and if such land was not free from pre-emption or other claim or rights, or was occupied by homestead settlers at the date of definite location on Dec. 8, 1884, it did not pass by the grant of 1864."

Then the court reiterate the reason for this conclusion, springing out of the last clause of Sec. 3 (the granting section) and the public policy in inducing settlers to occupy the unsurveyed wilderness, and the care manifested in protecting the railroad company by providing indemnity lands in lieu of those it might lose within place limits by reason of pre-emption or homestead settlements.

The following distinctions between the Nelson case and the one sub judice are to be observed:

1. The Nelson case presents an instance where the Land Department undertook to effect a withdrawal of land in aid of the grant, which the terms of the grant, (as expressed in the granting section) *declared should be and remain open to homestead settlement.*

The withdrawal could not have taken effect without repealing

the last clause of the granting section of the Nor. Pac. R. C. charter, which *expressly kept out of the grant lands falling within specified classes.*

The Court lay great stress on the inducement held out to immigrants to those uninhabited regions, who risked their lives and fortunes in reliance on the rights secured to them by the general land laws and saved to them by the granting clause of the N. P. Charter.

Now, in the L. S. & M. grant the language of the granting clause is simply "public lands;" it does not say public lands which are free at time of definite location from any sale, pre-emption, etc.

There is nothing in the granting section of the L. S. & M. grant *expressly saving to the public the right to pre-empt or occupy for homestead, etc.;* consequently there is nothing expressly or impliedly taking away from the department the right to do what it had from the beginning been recognized as having the right to do, viz: withdraw this land from pre-emption settlement and sale in aid of the L. S. & M grant.

Moreover, there was no vast uninhabited region to be occupied by this 160 miles of road between St. Paul and Lake Superior, that justifies the court in saying that it would be bad faith to give the withdrawal in this case effect, nor does it appear that the lands involved were unsurveyed, so that homestead settlers, or others, could not determine whether they were settling on odd or even numbered sections.

The L. S. & M. grant does not require a withdrawal prior to definite location, but recognizes the right of the Department to deal with the lands as it saw fit. It left the citizen, contemplating settlement on these lands, to his rights under the land laws as

affected by the recognized practice of the department to withdraw lands in its discretion.

2. The Nelson case presents an instance where the department undertook to *enlarge the grant* to the Nor. Pac. R. Co. by keeping out of market by its withdrawal order, lands, which, by the term of the grant were to be kept open for settlement until definite location.

Nothing less than legislative power could do this, and it cannot be otherwise, than, that a withdrawal order cannot be recognized if it seeks to withdraw lands which the legislature has declared shall remain open to settlement or other disposition under the general land laws.

Now the L. S. & M. grant contains no language expressly or impliedly intimating that the right of the citizen to acquire land under the existing laws, or the right of the department to withdraw lands and thus suspend the right of the citizen, is to be affected until definite location.

On the contrary Sec. 3 recognizes that odd sections or parts of sections might remain subject to disposal under the general laws, for it provides for indemnity lands in lieu of lands thus lost.

This shows that the control of the department over the public lands whether by withdrawal order or otherwise was left unimpaired.

This means that the department could withdraw lands in aid of the L. S. & M. grant, as had been done in aid of other grants.

3. The withdrawal in aid of the L. S. & M. grant does not run counter to an express reservation in favor of settlers, or others found in that grant, as the withdrawal in the Nelson case did.

This will clearly appear from a comparison of the two grants as to their granting, indemnity and legislative withdrawal provisions, which are given below in full, in parallel columns:

(*L. S. & M. Granting Clause.*)

"Sec. That there be, and hereby is granted to the State of Minnesota, for the purpose of aiding in the construction of a railroad in said state from the City of St. Paul to the head of Lake Superior, every alternate section of *public land* of the United States, not mineral, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad on the line thereof, within the State of Minnesota.

(*Nor. Pac. Granting Clause.*)

"Sec. 3. That there be, and hereby is granted to the Nor. Pac. R. Co., its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of mails, troops, munition of war and public stores, over the route of said railway, every alternate section of *Public land*, not mineral, designated by odd numbers, to the amount of twenty sections alternate sections per mile, on each side of said railroad, as said company may adopt through the territories of the U. S. and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any state, *and whenever on the line thereof, the United States have full title, not reserved, sold granted, or otherwise appropriated, and free from pre-emption, or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.*"

(*Indemnity Clause.*)

"But in case it shall appear that the United States have, when the line or route of said railroad is definitely fixed, sold, appropriated, reserved or otherwise disposed of any sections, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same then it shall be the duty of the Secretary of the Interior to select from lands of the United States, etc. (an amount equal to those sold or otherwise appropriated, or to which the rights of pre-emption or homestead settlement may have attached as aforesaid.")

(*Legislative Withdrawal Clause.*)

"Sec. 3. That when said road shall be definitely located and a plat thereof filed with the Secretary of the Interior, the lands hereby granted shall not thereafter be subject to settlement, pre-emption or private entry, adverse to this grant."

(*Indemnity Clause.*)

"And whenever, prior to said time, any of said sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior," etc.

(*Legislative Withdrawal Clause.*)

"Sec. 6. That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry or pre-emption, before or after they are surveyed except by said company, as provided in this act"—

4. The decision in the Nelson case is *Sui generis*, inasmuch as it rests upon the view a majority of the court took of the limitations imposed on the grant by the last clause of the granting section.

The Court did not undertake to lay down a rule that would apply to other railway grants, for they say:

> "The words 'occupied by homestead settlers' show that Congress intended by the Charter to the Northern Pacific Railroad Company—whatever it may have intended as to other companies receiving grants of public lands---that occupancy by a homestead settler, with the intention to take the benefit of the homestead laws, constituted a *claim*, which. existing at the date of definite location, would exclude from the grant, land that might otherwise be covered by it."

The dissenting opinion considers this opinion of the Court as subversive of the principle adapted in

Buttz v. Nor. Pac. R. Co. 119 *U. S.* 55.
Hewett v. Schultz, 180 *U. S.* 139.
Menotti v. Dillion, 167 *U. S.* 703.
Nor. Pac. R. Co. v. Musser-Sauntry, Etc., 168 *U. S.* 604.
U. S. v. Oregon & C. R. Co. 176 *U. S.* 28.

These cases recognize the right of the department to withdraw lands from market in aid of a railway grant in anticipation of definite location of the road.

This Nelson case simply adds to this rule the qualification that where the terms of the grant to the Railway (as in the Northern Pacific) expressly provides that the rights of homestead settlers shall not be taken away until definite location, the power of the Department to withdraw lands as against homestead settlers is taken away.

That this view of the Nelson case is correct appears from the reference thereto found in the opinion of the Court, in the case of *Toltec Ranch Company vs. Cook,* 191 *U. S. Op.* 541, as follows:

> "Nelson v. Northern Pacific Railroad Company was an action brought by the Railway Company to recover possession of a quarter section of land claimed to be within the land grant

of the Northern Pacific Railroad, and the company held the patent. Nelson claimed to have settled upon the land three years before the definite location of the road. He claimed, therefore, to be within the exceptions of the grant. The land when he settled on it was unsurveyed, and the effect of this constituted one of the questions in the case. Upon the filing of a map by the railroad company of its general route, an order was made by the Land Department withdrawing from settlement the land within the limits of the grant. The effect of this order was another question in the case. It was held, 'that the railroad company did not acquire any *vested* interest in the land here in dispute in virtue of its map of general route or the withdrawal order based on such a map,' and it was further held that Nelson's settlement upon the occupancy of the land was valid, and constituted a claim upon the land within the meaning of the Northern Pacific Act of 1864. In other words it was held that the land was excluded from the grant by express words. The operative words which produced the effect was expressed in the following provision of Section 3 of the Act: 'And, wherever, prior to said time, (of definite location) *any* of said sections or parts of sections shall have been granted, sold, reserved, *occupied by homestead settlers*, or pre-empted or otherwise disposed of, *other lands* shall *be selected* by said *company in lieu* thereof," etc., etc.

THIRD.

LANDS WITHDRAWN FROM SALE, ETC., ARE NOT "PUBLIC LANDS" WITHIN THE MEANING OF RAILROAD GRANTS.

Nor. Pac. Co. v. Musser-Sauntry Etc. Co., 168 *U. S.* 604.

In this case there had been a withdrawal of lands in indemnity limits made in aid of earlier grant to a railroad, prior to filing of map of definite location by the Nor. Pac. R. Co. and it was held that *such withdrawal operated to except the withdrawn lands from the Nor. Pac. Co. grant.*

This resulted from the words "reserved," "or otherwise appropriated" and "free from pre-emption or other claim or right" limiting the class of lands out of which the N. P. R. Co. grant could be satisfied.

The Court say the withdrawal was in effect a "reservation," and cite,

Wolcott v. Des Moines Co., 5 *Wall*, 681.

where it was held that the Proviso in a grant to the State of Iowa for the benefit of certain railroads,—"That any and all lands *heretofore reserved* to the United States by any act of Congress, or in *any other manner by competent authority*, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, be and the same is hereby reserved from the operation of this act" operated to take certain land out of the grant to the state.

The Court say:

> "It has been urged that these lands had not been reserved by competent authority, and hence that the reservation was nugatory.
>
> "As we have seen, they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines river—first by the Secretary of the Treasury, when the land department was under his supervision and control, and again by the Secretary of the Interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the President and Cabinet.
>
> "Besides, if this power was not competent, *which we think it was* ever since the establishment of the Land Department, and which has been exercised down to the present time, the grant of 8th Aug. 1846, carried along with it, by necessary application, not only the power, but the duty of the Land Office to reserve from sale the lands embraced in the grant, otherwise its object might be entirely defeated."

St. Paul & Pac. v. Nor. Pac. R. Co., 139 *U. S. I.* 18.

The court say: *Op.* 18.

In the recent case of Buttz v. R. Co. 119 U. S., 72, this court speaking of the act making the grant to the Nor. Pac. Co. said:

> "Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections for sale or pre-emption, it has been the practice of the department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local officers as may serve to guide aright those seeking settlements on the public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless."
>
> "After such withdrawal, no interest in the lands granted can be acquired, against the rights of the company, *except by special legislative declaration*, nor, indeed in the absence of its announcement, after the general route is fixed."

In this case of Nor. Pac. R. Co. v. Musser-Sauntry Etc. Co., 168 U. S., the Court say:

> "By the Nor. Pac. grant Congress meant that only such lands should pass as were *public lands* in the fullest sense of the term and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of the road." *Nor. Pac. v. Sanders*, 166 *U. S.* 620.

Hewett v. Schultz, 180 *U. S.* 473, (*L. ed.*) is a very instructive case on the power of the Land Department to withdraw lands from sale or other disposition.

Justice Brewer here says:

> "From the beginning of land grants the Land Department has exercised the power of withdrawing from pre-emption and homestead entry any body of lands, which in its judgment might be necessary for the satisfaction of the grant. And the existence of this power has been affirmed by this court

in many cases, and without a single exception up to the present time," and the learned Judge proceeds to cite many decisions which need not be here repeated.

Wilcox v. Jackson, 13 *Pet.* 497, (1839)

Since 1824 the lands had been reserved by the authority of the President as a reservation for military purposes, known as Fort Dearborn, near Chicago, under laws authorizing him to select sites for such purposes.

In 1835 B. was allowed by the local land officers to pre-empt it and paying therefor he received the usual receiver's receipt under the pre-emption law, which law prohibited entry and sale thereunder of land "reserved for the United States — --- --- by order of the President or which may have been appropriated for any purpose whatever."

The court held that this land had been "appropriated" by authority of the law, for the President was authorized to establish forts on the frontier and his selection of this land as a portion of Fort Dearborn was within his discretion.

The Court adopted a principle for determining questions of this character, using the following language:

> "But we go further, and say that, whensoever a tract of land shall have once been legally appropriated to *any purpose whatever*, from that moment the land thus appropriated *becomes severed from the mass of public lands, and that no subsequent law or proclamation or sale would be construed to embrace it, or to operate on it although no reservation were made of it.*" *Op.* 513.

Leavenworth. Etc. R. R. Co. v. U. S. 92 *U. S.* 733 (1875)

In 1825 the Osage Indians ceded to the United States a tract of land by which a certain part thereof was expressly "reserved" to them for occupancy so long as they chose.

In 1865 a further treaty was made whereby some of this reserved land was granted and sold to the government. in consideration for which sale the government, by the treaty of sale agree to pay the Indians a gross sum of money, to be deposited to their credit in the treasury of the United States and the interest thereon paid to the Indians annually. The treaty further provided that these relinquished lands should be surveyed and sold "as public lands are surveyed and sold under existing laws (including an act granting lands to the State of Kansas, in aid of a construction of a railroad through said lands) but no pre-emption claim or homestead settlement shall be recognized," and after reimbursing the government for its original sum deposited for them—$300,000—the costs of survey and sale the remaining proceeds were to be deposited as a "civilization fund" for the benefit of the Indians.

Two years before this last treaty—in 1863—Congress passed the act granting lands to the State of Kansas to aid in constructing certain railroads specified, by which act it was provided that,

> "In case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever," then other lands were to be selected as indemnity lands.
>
> Another clause exempted from the grant "all lands heretofore reserved to the United States, by any act of Congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever."

Under this grant a map of definite location of the road of the appellant was filed, Jan. 2, 1868, and on the 21, Jan., 1868, this land was withdrawn by order of the Commissioner.

The appellant claimed that, "although the grant did not operate upon any specific land until the road was located, it then took effect upon those in controversy, as they, by reason of the extinction of the Osage title in the meanwhile, had become, in the proper sense of the term, *public land.*"

In determining that this railroad grant did not pass the lands that had been reserved to the Indians for occupancy as long as they chose, the Court took pains to state, with great deliberation, the principle upon which such grants should be construed.

The Court say:

"This grant like that to Iowa (for the improvement of the Des Moines river, construed in Dubuque, etc., v. Litchfield, 23 How. 66) was made for the purpose of aiding a work of internal improvement, and does not extend beyond the intent it expresses. It should neither be enlarged by ingenious reasoning, nor diminished by strained construction. Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose, *unless there be an express declaration to that effect.* An express exception was not necessary; because the policy that dictated them confined them (railroad grants) to land which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts."

They quote, with approval, the language of the same court in the Litchfield case, ante:

"All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the Acts of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed, in the statute and if not thus expressed, they cannot be implied" citing *Rice v. R. Co.* 1 *Block*, 380, *Charles River Bridge v. Warren*, 11 *Pet.* 120.

Elsewhere they say:

"In Wilcox v. Jackson, 13 Pet. 498—the court added: We go further and say, that whenever a tract of land shall

have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and no subsequent law, proclamation, or sale would be construed to embrace it, although no reservation were made of it." It may be urged that it was not necessary in deciding that case to pass upon the question: but however that may be, the principle asserted is sound and reasonable and we accept it as a rule of construction. The Supreme Courts of Wisconsin and Texas have adopted it in cases where the point was necessarily involved. *State v. Delesdenier, 7 Tex. 76, Spaulding v. Martin, 11 Wis., 274.*"

The Court elsewhere say:

"Walcott v. Des Moines Nav. Co. 5 Wall 681, was a controversy concerning the title to certain land, which, it was conceded, were covered by a grant, unless excluded by the proviso thereunto annexed. The court held that they were excluded, although the land had not been reserved to the United States. They had been, in fact, *reserved by the executive officers of the government, upon a mistaken construction of a prior grant made* by the United States to the State of Iowa. This decision was re-affirmed in *Williams v. Baker, 17 id. 144.*

Newhall v. Sanger, 92 U. S. 761.

Here was an executive withdrawal of land, as required by the terms of the grant to the railroad company, on filing map of general route, and at that time there was pending for determination a claim to the land under a Mexican grant.

The railway grant excepted lands "sold, reserved or otherwise disposed of by the United States," etc., and also declared that it should "not defeat or impair any — — — lawful claim, nor include any government reservation or mineral lands, or improvements of any *bona fide* settler."

Held: This land being *sub judice* at the time of the withdrawal, was not embraced in the grant.

The Court say:

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.

Doolan v. Carr, 125 *U. S.* 618, and *Cameron v. U. S.* 148 *U. S.* 301 are to the same effect. In the last two cases it is said that the exemption from the grant of lands subject to claim cannot be construed as subject to "lawful" claim . *Kansas Pacific Ry. Co. v. Dunmeyer*, 113 *U. S.* 629.

Holds that under the grant to plaintiff, land subject to homestead claim when road is definitely fixed does not come under the grant afterwards in the event the homestead claim is not perfected.

To this effect also are,

Hastings Etc. R. Co. v. Whitney, 132 *U. S.* 357.
Sioux Falls Etc. v. Griffey, 143 *U. S.* 82.
Bardon v. N. P. R. R. Co., 145 *U. S.* 535.
Whitney v. Taylor, 159 *U. S.* 85.

In U. S. v. Oregon, Etc., Co., 176 *U. S.* 28 (*Op.* 46-7) the court, in speaking of the Menotti case, say:

"In Menotti v. Dillon the principal question was as to the rights acquired by a railroad company in virtue of its having filed its map of general route and the withdrawal by executive order of certain lands within the exterior lines of that route from pre-emption, private entry and sale—all before the passage of a subsequent act under which one of the parties claimed title to the land in dispute, the other claiming under the railroad Company."

The Court further said:

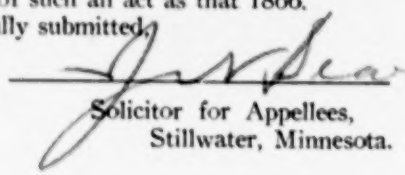
"It is said that the railroad company filed its map of general route on Dec. 9, 1864, and that these lands having been withdrawn from pre-emption, private entry and sale by execu-

tive order Jan. 30, 1865, they were not embraced by the act of 1866.

"In our opinion this is not a proper interpretation of the act. The proviso of the 1st section distinctly indicates certain cases to which the act should not apply, and distinctly excluding those cases and no others from its operation, the act in express words confirmed to the state 'in all cases' lands which the state had theretofore selected in satisfaction of any grant by Congress and sold to purchasers in good faith under its laws. No exception is made of lands which, at the date of its passage, *were withdrawn from pre-emption, private entry and sale*, pursuant to the filing by the railroad company of its map of general route."

"And the Court should not construe the act as excluding lands in that condition, unless prepared to hold that Congress had no power to confirm to the state lands which, at the time, were simply withdrawn from pre-emption, private entry or sale for railroad purposes. We cannot so adjudge. The withdrawal order of Jan. 30, 1865, did not, in our judgment, stand in the way of the passage of such an act as that 1866.

Respectfully submitted,



Solicitor for Appellees,
Stillwater, Minnesota.

Supreme Court of the United States.

No. 121.—October Term, 1906.

The Northern Lumber Company, Appellant, vs. William O'Brien, Albert J. Lammers and Mary E. Coffin. } Appeal from the United States Circuit Court of Appeals.

[January 14th 1907.]

Mr. Justice Harlan delivered the opinion of the Court.

This suit involves the title to the south half of the southeast quarter of section twenty-seven township fifty-two north, range fifteen west, in the State of Minnesota.

The principal question in the case is whether the land in dispute was embraced by the grant of public lands made by Congress July 2d 1864, 13 *Stat.* 365, 367, *c.* 217, to the Northern Pacific Railroad Company in aid of the construction of a railroad and telegraph line from Lake Superior to Puget Sound. If it was not, then the decree of the Circuit Court dismissing the bill was right, as was that of the Circuit Court of Appeals affirming that decree.

By the act of May 5th 1864, 13 *Stat.* 64, *c.* 79, Congress made a grant of public lands to the State of Minnesota in aid of the construction of a railroad from St. Paul to the head of Lake Superior. This grant was vested in the Lake Superior and Mississippi Railroad Company, and that company on the 7th day of May 1864 filed its map of *general* route. This map was accepted by the Land Department and a copy was transmitted May 26th 1864 to the proper local land office, which was informed of the approval by the Secretary of the Interior of a *withdrawal of lands for the Lake Superior and Mississippi* road, and that office was ordered to suspend, and it did suspend, "from pre-emption, settlement and sale a body of land about twenty miles in width," *as indicated on the above map.* The land in dispute was within the exterior lines of this general route of the Lake Superior and Mississippi road as defined by its map, and was *part of the land so withdrawn.*

After the acceptance of the map of general route of the Lake Superior and Mississippi Railroad, and *after* the withdrawal by the Land Department, for the benefit of that company, of the lands covered by that map,

Congress, by the above act of July 2d 1864, 13 *Stat.* 365, 367, *c.* 217, declared "that there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of *public land*, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; . ."

In 1866 the Lake Superior and Mississippi Railroad Company filed a map of the *definite* location of its road, from which it appeared that the land in dispute was outside of the place, indemnity and terminal limits of that road as thus located.

In 1882 the Northern Pacific Railroad Company filed its map of definite location, which showed that the particular lands here in dispute were in the place limits indicated by that map.

In 1883 the latter company filed in the proper office a list of lands which it asserted were covered by the grant made to it on July 2d 1864 and on that list, among other lands, were those here in dispute.

In 1901 the Commissioner of the Land Office refused to approve and rejected the list so far as the lands now in question were concerned, upon the ground that, although they appeared, after the definite location of the Northern Pacific Railroad, to be within the primary limits of the grant made for that road by the act of July 2d 1864, they "were *excepted from the operation of said grant* because they were, *at the date of the passage of said act*, within ten miles of the probable route of the Lake Superior and Mississippi Railroad in aid of the construction of which a grant was made by the act of May 5th 1864, and *were embraced within the withdrawal of May* 26th 1864, made on account of the last-mentioned grant." The question was taken on appeal to the Secretary of the Interior, and he also rejected the above list, rendering a decision under date of July 16th 1901, affirming the decision of the Commissioner—the Secretary ruling that as these lands were, *at the date of the grant to the Northern Pacific Railroad Company*, already "included within *an existing and lawful withdrawal* made in aid of a prior grant," they were not to be deemed "public lands" when the Northern Pacific grant of 1864 was made, and, consequently,

were not embraced by that grant. The Secretary held that the fact that a right under a prior grant did not eventually attach to the lands here in question was immaterial; "first, because the act of July 2, 1864, was a grant *in præsenti*, and second, because a reservation on account of a prior grant will defeat a later grant like that of July 2, 1864, whether the lands are needed in satisfaction of the prior grant or not." 31 *L. D.* 33. Under that decision the above list filed by the Northen Pacific Railroad Company was formally and finally cancelled, and these lands were never assigned to it by the Land Department.

Although the stipulation of the parties as to the facts is very lengthy, those here stated are sufficient to present the point upon which, it is agreed, the decision of the case depends.

We have seen that at the date of the grant of July 2d 1864 to the Northern Pacific Railroad Company the particular land in dispute was within the lines designated by the accepted map of the *general* route of the Lake Superior and Mississippi Railroad; and that the grant for the Northern Pacific Railroad was of "public land." Was the land here in dispute *public* land *at the date of the passage* of that act? If by reason of its having been then withdrawn by the Land Department from preemption, settlement and sale, it was not at the date of the Northern Pacific grant to be deemed public land, did that grant attach to it when the Northern Pacific road was definitely located in 1882? These questions were answered in the negative by both the Circuit Court and the unanimous judgment of the Circuit Court of Appeals. *Northern Lumber Co.* v. *O'Brien &c.*, 134 *Fed. Rep.* 303; *Ib.* 139 *Fed. Rep.* 614.

It has long been settled that the grant to the Northern Pacific Railroad Company by the act of 1864 was one *in præsenti;* that is, the company took a present title, as of the date of the act, to the lands embraced by the terms of the grant; the words "that there be, and hereby is, granted" importing "a transfer of present title, not a promise to transfer one in the future." In *St. Paul & Pacific* v. *Northern Pacific*, 139 *U. S.* 1, 5, the court said "that the route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in præsenti;* that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route. This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion. *Schulenberg* v. *Harriman*, 21 *Wall.* 44, 60; *Leavenworth, Lawrence &c. Railroad Co.* v. *United States*, 92 *U. S.* 733;

Missouri, Kansas &c. Railway Co. v. *Kansas Pacific Railway Co.*, 97 *U. S.* 491; *Railroad Co.* v. *Baldwin*, 103 *U. S.* 426." The same principle was reaffirmed in *Bardon* v. *Northern Pacific Railroad*, 145 *U. S.* 535, 543, and in many other cases which are familiar to the profession and need not be cited.

Again, no lands passed that were not, at the date of the grant, public land; that is, lands "open to sale or other disposition under general laws," not lands "to which any claims or rights of others have attached." *Bardon* v. *Northern Pacific Railroad, above cited.* At the time of the grant of 1864 to the Northern Pacific Railroad Company the lands here in dispute were, as we have seen, among those *withdrawn* by the Land Department from pre-emption, settlement and sale, and were held specifically under the grant of May 5th 1864 for the Lake Superior and Mississippi Railroad. They were not, therefore, public lands embraced by the later grant to the other company. The grant of the Northern Pacific Railroad Company spoke as of the date of the act of July 2d 1864; and that company did not acquire any title to these lands, then withdrawn, by reason of the fact that when its line, at a subsequent date, was definitely located they had become freed from the grant made by the act of May 5th 1864 to the State of Minnesota. Being at the date of the grant of July 2d 1864 *under the operation of an order of withdrawal by the Land Department*, they were not in the category of lands embraced by that grant of "public lands." When the withdrawal order ceased to be in force the lands so withdrawn did not pass under the later grant but became a part of the public domain, subject to be disposed of under the general land laws, and not to be claimed under any railroad land grant. There is no escape from this conclusion under the adjudged cases.

In *Kansas Pacific Railroad Co.* v. *Dunnmeyer*, 113 *U. S.* 629, in which the attempt was made to include within a railroad grant lands to which a homestead claim had previously attached, but which claim had ceased to exist when the line of the railroad was definitely fixed, the court, speaking by Mr. Justice Miller, said: "No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road, and others with grants in similar language, have more than once passed through military reservations, for forts and other purposes, which have been given up or abandoned as such reservations and were of great value; nor is it understood that *in any case where lands had been otherwise disposed of their reversion to the Government brought them within the grant.* . ."

In *Bardon* v. *Northern Pacific Railroad*, above cited, Mr. Justice Field, delivering the unanimous judgment of the court, said: "In the *Leaven-*

worth case" [92 *U. S.* 733] "the appellant, the railroad company, contended that the fee of the land was in the United States, and only a right of occupancy remained with the Indians; that under the grant the State would hold the title subject to their right of occupancy; but as that had been subsequently extinguished, there was no sound objection to the granting act taking full effect. The court, however, adhered to its conclusion, that the land covered by the grant could only embrace lands which were at the time public lands, free from any lawful claim of other parties, unless there was an express provision showing that the grant was to have a more extended operation, citing the decision in *Wilcox* v. *Jackson*, 13 *Pet.* 498, to which we have referred above, *that land once legally appropriated to any purpose was thereby severed from the public domain and a subsequent sale would not be construed to embrace it, though not specially reserved.* And of the Indians' right of occupancy it said, that this right, with the correlative obligation of the Government to enforce it, negatived the idea that Congress, even in the absence of any positive stipulation to protect the Osages, intended to grant their land to a railroad company, either absolutely or *cum onere.* 'For all practical purposes,' the court added, 'they owned it; as the actual right of possession, the only thing they deemed of value, was secured to them by treaty, until they should elect to surrender it to the United States.' Three justices, of whom the writer of this opinion was one, dissented from the majority of the court in *The Leavenworth case;* but the decision has been uniformly adhered to since its announcement, and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted, that, in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are *at the time* free from existing claims, is better and safer, both to the Government and to private parties, than the rule which would pass the property subject to the liens and claims of others. The latter construction would open a wide field of litigation between the grantees and third parties."

Again, in the same case, where the contention was that the Northern Pacific grant embraced lands to which a pre-emption claim had previously attached, but which claim was cancelled after the date of that grant, the court said: "That pre-emption entry remained of record until August 5, 1865, when it was cancelled, but this was after the date of the grant to the Northern Pacific Railroad Company, and also after the dates of several grants made to the State of Wisconsin to aid in the construction of railroad and telegraph lines within that State. *The cancellation, as already said, did not have the effect of bringing the land under the operation of the grant to the Northern Pacific Railroad Company; it simply restored the*

land to the mass of public lands, to be dealt with subsequently in the same manner as any other public lands of the United States not covered by or excepted from the grant."

In *United States* v. *Southern Pacific Railroad*, 146 *U. S.* 570, 606, this court, speaking by Mr. Justice Brewer, said: "Indeed, the intent of Congress in all railroad grants, as has been understood and declared by this court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as *at that time* are public lands, and, therefore, grantable by Congress, and is never to be taken as a floating authority to appropriate all tracts within the specified limits which at any subsequent time may become public lands." In *Whitney* v. *Taylor*, 158 *U. S.* 85, 92, Mr. Justice Brewer, again speaking for the court, said: "That when on the records of the local land office there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the Government and has not been cancelled or set aside, the tract in respect to which that claim is existing *is excepted from the operation of a railroad land grant* containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the Government at its own suggestion or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim; it was enough that the claim existed, and the question of its validity was a matter to be settled between the Government and the claimant, in respect to which the railroad company was not permitted to be heard." In *Spencer* v. *McDougal*, 159 *U. S.* 65, the court referred to *Wolcott* v. *Des Moines Co.*, 5 *Wall.* 681, in which the question arose whether a grant of public lands, on each side of Des Moines River, in aid of navigation, terminated at the mouth of Raccoon Fork or extended along the whole length of the river to the northern boundary of the State, and said: "The land department ordered that lands the whole length of the river within the State should be withdrawn from sale. In the course of subsequent litigation it was decided by this court that the grant terminated at the mouth of the Raccoon River. But in the case cited it was held that the withdrawal by the land department of lands above the mouth of the Raccoon River was valid, and that a subsequent railroad grant, with the ordinary reservation clause in it, *did not operate upon lands so withdrawn.*" So, in *Northern Pacific Railroad* v. *Musser-Sauntry Co.*, 168 *U. S.* 604, 607, 611: "But a single question is presented in this case, and that is whether the withdrawal from sale by the Land Department in March, 1866, of lands within the indemnity limits of the grant of 1856 and 1864 exempted such

lands from the operation of the grant to the plaintiff. It will be perceived that the grant in aid of the defendant railway company was prior in date to that to the plaintiff, and that before the time of the filing of plaintiff's map of general route and definite location the lands were withdrawn for the benefit of the defendant. The grant to the plaintiff was only of lands to which the United States had 'full title, not reserved, sold, granted or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed. The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the Government under the general land laws. The act of the Secretary was in effect a reservation. *Wolcott* v. *Des Moines Co.*, 5 *Wall.* 681; *Wolsey* v. *Chapman*, 101 U. S. 755, and cases cited in the opinion; *Hamblin* v. *Western Land Company*, 147 U. S. 531, and cases cited in the opinion. It has also been held that such a withdrawl is effective against claims arising under subsequent railroad land grants. *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1, 17, 18; *Wisconsin Central Railroad* v. *Forsythe*, 159 U. S. 46, 54; *Spencer* v. *McDougal*, 159 U. S. 62. . . All that we here hold is, that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant and made prior to the filing of the map of definite location by a company having a later grant—the latter having such words of exception and limitation as are found in the grant to the plaintiff—*it operates to except the withdrawn lands from the scope of such later grant.*" The doctrines of these cases were recognized in the recent case of *Northern Pacific Railway* v. *Lacey*, 174 *U. S.* 622.

In view of these decisions it is clear that as the lands in dispute were, at the date of the grant to the Northern Pacific Railroad Company, withdrawn, of record, for the benefit of the Lake Superior and Mississippi Railroad, under a prior grant, they were not public lands within the meaning of the later grant, and did not come under it, when or because it was subsequently ascertained that they were without the line of the definite location of the road of the Lake Superior Railroad Company, and within the place limits of the Northern Pacific as defined by its map of definite location. When freed from the operation of the accepted map of general route filed by the Lake Superior and Mississippi Railroad Company, they did not come under the operation of the later grant to the Northern Pacific Railroad, but became a part of the public lands constituting the public domain and subject only to be disposed of under the general laws relating to the public lands. If, by the act of July 2d 1864, or before the line of the Northern Pacific Railroad was definitely located, Congress had, in terms,

appropriated, for the benefit of that road, any of the lands embraced in the general route of the other road, a different question would be presented. But it did not do so. It only granted for the benefit of the Northern Pacific Railroad lands which *then*, July 2d 1864, were public lands, and no lands were public lands, within the meaning of Congress, which, at that time, were withdrawn by the Land Department; that is, reserved for the purposes of a grant prior although such reservation turned out to have been a mistake.

The suggestion is made in this connection that the order of the Land Department was too uncertain and indefinite to have any legal force, because the direction to the local land office was to suspend from pre-emption, settlement and sale "a body of land *about* twenty miles in width." We deem this suggestion without merit. The order for withdrawal referred to the diagram or map showing the road's probable route; and it is agreed that the lands in dispute are coterminous and within ten miles of the line of the general route of the Lake Superior and Mississippi Railroad, *as defined by the above diagram or map.* The map, however indefinite, was intended to cover these lands. It sufficiently indicated these lands and the probable route of the road, and that was enough.

Many cases are called to our attention which are supposed to militate against the views we have here expressed. We have examined those referred to and do not perceive that any one of them decided the particular question now before us. No one of them holds that a grant, *in præsenti*, of public lands, with the ordinary reservations, embraces lands which, at the date of such grant, are under the operation of a formal order of the Land Department, of record, withdrawing them for the benefit of a prior grant in the event they should be needed for the purposes of such grant. Nor does any of them hold that the subsequent cancellation of such withdrawal order had the effect to bring them under the operation of a later grant of public lands. It is said that *United States* v. *Oregon & Cal. R. R. Co.*, 176 *U. S.* 28, and *Wilcox* v. *Eastern Oregon Co.*, 176 *U. S.* 51, should be regarded as controlling and decisive of this case for the appellant. We do not think so. The principal point decided in those cases was that nothing in the act of 1864 prevented Congress by legislation from appropriating for the benefit of other railroad corporations lands that might be or were embraced within the *general* route of the Northern Pacific Railroad; and this for the reason that an accepted map of general route only gave the company filing it an inchoate right and did not pass title to specific sections until they were identified by a definite location of the road. Besides, in neither case was there in force, at the date of the later grant, an accepted, effective order of the Land Department withdrawing the

lands there in dispute pursuant to an accepted map of the *general* route of the Northern Pacific Railroad. If there had been an order of that kind, it would still have been competent for Congress to dispose of the lands, within such general route, as it saw proper, at any time prior to the definite location of the road under the later grant. In conformity with prior decisions it was so adjudged in the two cases above cited. Those cases did not adjudge that a grant of "public land," with the usual reservations, embraced any lands which, *at the time*, were formally withdrawn by the Land Department from pre-emption, settlement or sale, for the benefit of a prior grant.

We are of opinion that the Circuit Court and the Circuit Court of Appeals correctly interpreted the decisions of this court and did not err as to the law of the case. The judgment below must, therefore, be affirmed.

It is so ordered.

True copy.

Test:

Clerk Supreme Court U. S.